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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 450.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 8, 1915.

(24,702)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1915.

1 In the Supreme Court of the State of Kansas.

Be it remembered, That on the 8th day of June, 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a certified copy of the Notice of Appeal and proof of service thereof, which notice of appeal, with endorsements thereon is in words and figures as follows, to-wit:

Filed Jun- 8 1914. D. A. Valentine, Clerk Supreme Court.

2 In the District Court of Shawnee County, Kansas, First Division.

No. 28681.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Plaintiff,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Defendant.

Notice of Appeal.

To Charles H. Sessions, Secretary of State of the State of Kansas, Defendant, and

To J. S. Dawson, W. P. Montgomery and F. P. Lindsay, Attorneys of record for said Defendant:

You are hereby notified that the plaintiff, The Kansas City, Fort Scott & Memphis Railway Company appeals to the Supreme Court of the State of Kansas, from the judgment of the District Court of Shawnee County, Kansas, First Division, rendered by said court on May 16, 1914, in the above entitled action, sustaining defendant's demurrer to plaintiff's petition in said case and rendering judgment in favor of defendant and against the plaintiff.

You are further notified that the original of this notice has been filed by said plaintiff with the Clerk of the District Court of Shawnee County, Kansas.

W. F. EVANS,
R. R. VERMILION,
W. F. LILLESTON,
Attorneys for Plaintiff, The Kansas City, Fort Scott & Memphis Railway Company.

Endorsements: #28681. In District Court of Shawnee Co., Kan. The Kansas City, Ft. Scott & Memphis Ry. Co., Pl'ff v. Charles H. Sessions, etc. Def't. Notice of Appeal. Filed June 5, 1914. C. W. Bower, Clerk District Court.

3 In the District Court of Shawnee County, Kansas, First Division.

No. 28681.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Plaintiff,

vs.

CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Defendant.

Notice of Appeal.

To Charles H. Sessions, Secretary of State of the State of Kansas, Defendant, and

To J. S. Dawson, W. P. Montgomery, and F. P. Lindsay, Attorneys of record for said Defendant:

You are hereby notified that the plaintiff, The Kansas City, Fort Scott & Memphis Railway Company appeals to the Supreme Court of the State of Kansas, from the judgment of the District Court of Shawnee County, Kansas, First Division, rendered by said court on May 16, 1914, in the above entitled action, sustaining defendant's demurrer to plaintiff's petition in said case and rendering judgment in favor of defendant and against the plaintiff.

You are further notified that the original of this notice has been filed by said plaintiff with the Clerk of the District Court of Shawnee County, Kansas.

W. F. EVANS,
R. R. VERMILION,
W. F. LILLESTON,
Attorneys for Plaintiff, The Kansas City, Fort Scott & Memphis Railway Company.

4 We the undersigned attorneys of record for Charles H. Sessions, Secretary of State of the State of Kansas, defendant in the above entitled case, do hereby acknowledge due and legal service by plaintiff, of the above and foregoing notice of appeal, on us, at the City of Topeka, Shawnee County, Kansas, on the 5th day of June, 1914.

JOHN S. DAWSON,
Attorney General.
F. P. LINDSAY,
W. P. MONTGOMERY,
Attorneys for Defendant Charles H. Sessions, Secretary of State of the State of Kansas.

I, Charles H. Sessions, Secretary of State of the State of Kansas, the defendant named in the attached Notice of Appeal, do hereby acknowledge due and legal service by plaintiff of the attached and

foregoing notice of appeal, on me at the City of Topeka, Shawnee County, Kansas, on this 5th day of June, 1914.

CHARLES H. SESSIONS,
Secretary of State of the State of Kansas, Defendant.

5 STATE OF KANSAS,
Shawnee County, ss:

I, W. F. Lilleston, of lawful age, being first duly sworn, upon oath, depose and say:

That for and on behalf and at the request of the plaintiff, The Kansas City, Fort Scott & Memphis Railway Company, I did, on the 5th day of June, 1914, serve the attached Notice of Appeal upon the defendant Charles H. Sessions, Secretary of State of the State of Kansas, and upon John (J) S. Dawson, attorney of record for said defendant, by delivering to said defendant and his said attorney of record, and each of them personally, an exact signed copy of the attached Notice of Appeal, and that I am one of the attorneys for said plaintiff and was lawfully authorized to serve said Notice of Appeal as aforesaid and to make this affidavit.

W. F. LILLESTON.

Subscribed and sworn to before me, by W. F. Lilleston, this 5th day of June, 1914.

[SEAL.] LEW L. COLLINS,
Notary Public in and for the County of Shawnee, State of Kansas.

My Commission expires Sept. 1, 1914.

Endorsements: #28681. In District Court of Shawnee Co., Kans. The Kansas City, Ft. Scott & Memphis Ry. Co. Plff. v. Charles H. Sessions, etc., Deft. Acknowledgment & Proof of Service of Notice of Appeal. Filed June 5, 1914. C. W. Bower, Clerk District Court.

6 Whereas, Be It Remembered. That on this 16th day of May, A. D. 1914, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Honorable A. W. Dana, presiding Judge of the first division, it being at the April, 1914, term of said Court, the following proceedings among others, were had, to-wit:

First Division.

No. 28681.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
Plaintiff,
vs.
CHARLES H. SESSIONS, Secretary of State of the State of Kansas,
Defendant.

Now, on this ninth day of May, A. D. 1914, the above entitled action comes on for hearing upon the demurrer heretofore filed by said defendant to the petition of the plaintiff in this action, and the plaintiff appears by W. F. Evans, R. R. Vermilion and W. F. Lilleston, its attorneys; and the defendant appears by J. S. Dawson, W. P. Montgomery and F. P. Lindsay, his attorneys, and said demurrer is submitted to the court and the same taken under advisement; and on this sixteenth day of May, A. D. 1914, the court being fully advised in the premises, orders and adjudges that the said demurrer of the said defendant be and the same is hereby sustained, to which judgment and ruling the plaintiff excepts; whereupon the plaintiff declines to plead further and elects to stand upon its petition.

It is therefore considered, ordered and adjudged by the court that the plaintiff take nothing by this action and that the defendant have and recover of and from the plaintiff the costs of this action taxed at $—, to which judgment plaintiff excepts.

A. W. DANA,
Judge of the District Court.

O. K.
J. S. DAWSON,
Att'y for Deft.

O. K.
R. R. VERMILION,
Att'y for Plff.

7 *Certificate.*

STATE OF KANSAS,
Shawnee County, ss:

I, C. W. Bower, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal, Acknowledgment of Proof of Service of Notice of Appeal, Affidavit of W. F. Lilleston of Service of Notice of Appeal, Order Sustaining Defendant's Demurrer to Petition, in the above entitled cause, as the same appears on file and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka this 6 day of June, A. D. 1914.

[SEAL.]

C. W. BOWER, *Clerk,*
By JESSIE M. CURTIS,
Deputy Clerk.

(Endorsed:) 19,558. The K. C., Ft. Scott & M. Ry. Co. Appellant vs. Chas. H. Sessions, etc. Appellee. Notice of Appeal and Transcript. Filed June 8, 1914. D. A. Valentine, Clerk Supreme Court.

8 That afterwards, on the 4th day of September, 1914, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the appellant's abstract of the record, which abstract is in the words and figures, as follows, to-wit:

9 19558. Filed Sep. 4, 1914. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

Number 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,
vs.
CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Appellee.

Appeal from the District Court of Shawnee County, Kansas, First Division, A. N. Dana, Trial Judge.

Appellant's Abstract of Record.

R. R. VERMILION,
Attorney for Appellant.

9a In the Supreme Court of Kansas.

Number 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,
vs.
CHARLES H. SESSIONS, Secretary of State of the State of Kansas, Appellee.

Appeal from the District Court of Shawnee County, Kansas, First Division, A. N. Dana, Trial Judge.

Specification of Errors Complained of by Appellant.

I.

The court below erred in rendering judgment sustaining defendant's demurrer to the plaintiff's petition.

II.

The court below erred in rendering judgment in favor of the defendant and against plaintiff for costs.

III.

The court below erred in rendering judgment sustaining defendant's demurrer to plaintiff's petition, and in favor of the defendant and against the plaintiff for costs.

IV.

The court below erred in rendering judgment in favor of the defendant and against the plaintiff.

9b On March 31, 1914, the plaintiff filed in the District Court of Shawnee County, Kansas, First Division, its petition, which, omitting the caption, signature of counsel, endorsements and filing marks, was as follows:

Petition.

Plaintiff for its cause of action, states that the defendant is the duly elected, qualified and acting Secretary of State of the State of Kansas. That the plaintiff is now and for more than ten years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of Kansas with an authorized capital stock of 600,000 shares of the par value of One Hundred ($100.00) Dollars each, of which has been issued paid up and are now outstanding, 316,600 shares of One Hundred ($100.00) Dollars each. That the plaintiff by its charter was and is authorized to own, construct, operate and maintain a railroad and railroads in the State of Kansas and in other states. That the plaintiff by and with the means derived from the issuing and sale of the said 316,600 shares of One Hundred ($100.00) Dollars each of its capital stock has constructed and acquired a line of railroad and railroads extending from Kansas City, in the State of Missouri, south to and through the State of Kansas, and into and across the States of Oklahoma, Missouri, Arkansas and Tennessee, with all its necessary side tracks, turn-outs, stations, shops and terminal facilities necessary for the successful operation of said railroad system. That said rail-
9c road and each and every part thereof has been for more than ten years last past, and is now leased to the St. Louis & San Francisco Railroad Company, which company or the receivers who have been duly appointed for its railroads and property have during the period herein named, and are now operating said railroad system and each and every part thereof as common carriers of passengers and property for hire and engaged in interstate commerce between the several states hereinbefore named. That all of the said capital stock of the plaintiff so issued and outstanding is, and has been for

more than ten years last past, invested in and used in acquiring said above described railroad line and lines extending into and through the above named states which have been during all the times aforesaid and now are being used in carrying on interstate commerce. That the defendant herein as Secretary of State of the State of Kansas has demanded of the plaintiff herein, the payment to the said defendant of the sum of Two Thousand Five Hundred ($2500.00) Dollars as a corporation tax or fee on all the capital stock of the plaintiff herein so issued and outstanding and invested as aforesaid. That the plaintiff herein, protesting that the said demand of the defendant for the payment of said sum as such corporation tax and fee was and is illegal and unauthorized, and that the plaintiff herein was under no legal obligation to pay said amount to the defendant, did, on the 31st day of March, A. D. 1914, pay to the said defendant, under protest and duress and against
9d its will, said sum of Two Thousand Five Hundred ($2,500.00) Dollars, which sum was received by the defendant and is now retained by him.

Plaintiff alleges that said sum of money was demanded of it by the defendant, and was received from it by the defendant under the claim and pretense on the part of the defendant that the provisions of Chapter 135 of the Sessions Laws of the State of Kansas enacted by the Legislature of said state at the session of 1913, authorized and empowered the defendant to demand and receive of the plaintiff herein, said sum of money as a corporation tax and fee as aforesaid, and under the claim that the plaintiff herein was legally obligated under the provision of said Chapter 135 to pay the same, and that by the provisions of said law so enacted by the Legislature of the State of Kansas, every corporation organized under the laws of the State of Kansas for profit, is required to pay to the Secretary of State an annual fee upon the amount of its paid up capital stock, which amount is governed by the amount of such paid up capital stock, and by said law it is provided that when the paid up capital stock of a corporation organized under the laws of the State of Kansas exceeds $5,000,000.00, the annual fee shall be $2500.00.

Plaintiff alleges that its paid up capital stock exceeds the sum of Five Million ($5,000,000.00) Dollars and equals the sum of Thirty-one Million Six Hundred Thousand Six Hundred ($31,600,600.00) Dollars.

9e Plaintiff alleges that the said capital stock of this plaintiff is now and has been at all times during the last ten years invested in said line of railroad which extends into and across the several states above named, more than three-fourths of which property is situated outside of the State of Kansas, and more than three-fourths of said capital stock is now and was at all times above stated invested in and devoted to said business outside of the State of Kansas.

Plaintiff alleges that the provisions of said Chapter 135 of the Session Laws of the State of Kansas of 1913, are invalid and did not authorize the defendant to demand and receive of the plaintiff the aforesaid sum of money for the aforesaid purpose, and that the

plaintiff herein was under no legal obligation to pay said sum for said purpose. That the provisions of said Chapter 135 of the Laws of 1913 are in conflict with and are repugnant to that provision of Section 10, of Article I, of the Constitution of the United States, which provides that Congress shall have power "To regulate commerce with foreign nations and among the several states and with the Indian tribes." That the Congress of the United States has enacted laws regulating commerce between the several states and between the states above referred to into and through which the line of railroad of the plaintiff herein extends.

9f Plaintiff alleges that at the time the defendant demanded of this plaintiff the payment of said sum, and at the time he received the same, defendant well knew the same was illegal and that he had no lawful right to demand and receive the same. Plaintiff herein, under the fear that if the said law contained in said Chapter 135 of the Session Laws of 1913, should perchance be held valid, plaintiff would suffer the severe penalties prescribed in said law and have its charter revoked in case it did not pay said sum, and by reason of said demand, paid the same, protesting at the time that it was illegal and should not be exacted from plaintiff.

Plaintiff alleges that said Chapter 135 of the Session Laws of 1913 of the State of Kansas attempts to, and if enforced will impose a burden on interstate commerce, in that it exacts the payment of a fee and places a tax upon the capital stock of the plaintiff herein, which is now and at all times hereinbefore referred to was used and employed in carrying on commerce between the several states hereinbefore named, and if enforced would enable the State of Kansas and the defendant herein to levy and collect a tax from the plaintiff herein on its property situated outside of and beyond the limits of the State of Kansas, and which is used in carrying on interstate commerce and on its capital stock devoted to carrying on interstate commerce outside the State of Kansas.

Wherefore, plaintiff prays judgment against the defendant for the aforesaid sum of Two Thousand Five Hundred ($2,500.00) Dollars, with interest thereon at the rate of six per cent per annum from the 31st day of March, 1914, together with the costs of this suit.

9g Thereafter, in due time, the defendant duly filed his demurrer to said petition, which demurrer, omitting caption, signature of counsel, endorsements and filing marks, was as follows:

Demurrer.

Now comes the defendant herein and demurs to the plaintiff's petition, for the reason that said petition does not state facts sufficient to constitute a cause of action.

Thereafter said demurrer was submitted to and was heard by the court below and was by the court sustained and judgment rendered thereon in said case as follows:

Journal Entry.

Now, on this ninth day of May, A. D. 1914, the above entitled action comes on for hearing upon the demurrer heretofore filed by said defendant to the petition of the plaintiff in this action, and the plaintiff appears by W. F. Evans, R. R. Vermilion and W. F. Lilleston, its attorneys; and the defendant appears by J. S. Dawson, W. P. Montgomery and F. P. Lindsay, his attorneys, and said demurrer is submitted to the court and the same taken under advisement; and on this sixteenth day of May, A. D. 1914, the court being fully advised in the premises, orders and adjudges that the said demurrer of the said defendant be and the same is hereby sustained, to which judgment and ruling the plaintiff excepts; whereupon the plaintiff declines to plead further and elects to stand upon its petition.

9*b* It is therefore considered, ordered and adjudged by the court that the plaintiff take nothing by this action and that the defendant have and recover of and from the plaintiff the costs of this action taxed at $—, to which judgment plaintiff excepts.

Notice of appeal of this case by plaintiff to the Supreme Court of Kansas, was duly filed, and copy thereof served, service duly acknowledged and proved, proof filed and appeal perfected within due time.

I, the undersigned attorney for appellant named in the foregoing abstract, do hereby certify that the foregoing is a true and complete abstract of the record in the case therein named.

R. R. VERMILION,
Attorney for Appellant.

Cost of Abstract $5.00.
Paid by appellant.

10 And afterwards, on the 14th day of January, 1915, the same being one of the regular judicial days of the January term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court Room in the City of Topeka, the following proceeding, among others, was had, and remains of record in words and figures as follows, to-wit:

11 In the Supreme Court of the State of Kansas, Thursday, January 14, 1915.

No. 19558.

KANSAS CITY, FT. SCOTT & MEMPHIS RAILWAY CO., Appellant,
vs.
CHARLES H. SESSIONS, as Sec. of State, Appellee.

Journal Entry of Substitution.

Now, on this 14th day of January, 1915, it appearing to the court upon suggestion of the appellants in the two actions first above

mentioned and the defendants, The Chicago, Rock Island and Pacific Railway Company, Chicago, Burlington and Quincy Railroad Company, and Kansas City Southern Railway Company, in the action last above mentioned, that on January 11th, 1915, Charles H. Sessions, as Secretary of State of the State of Kansas, was succeeded by J. T. Botkin, who was duly elected and has duly qualified in said office, and that John S. Dawson, as Attorney General of the State of Kansas, has been succeeded by S. M. Brewster, who was duly elected and has duly qualified in said office, and upon application and motion made in open court, and upon consent duly obtained,

It is ordered that said actions be, and the same are revived in the names of J. T. Botkin as Secretary of State of the State of Kansas, to be substituted in the place of Charles H. Sessions, and S. M. Brewster as Attorney General of the State of Kansas, to be substituted in the place of John S. Dawson, and that said respective suits proceed accordingly.

12 And afterwards, on the 4th day of March, 1915, the same being one of the regular judicial days of the January term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court room in the City of Topeka, the following proceeding, among others, was had and remains of record in words and figures as follows, to-wit:

13 In the Supreme Court of the State of Kansas, Thursday, March 4, 1915.

No. 19558.

K. C., Ft. S. & M. Ry. Co., Appellant,
vs.
Charles H. Sessions, etc., Appellee.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of Division No. One, of the district court of Shawnee County; thereupon after oral argument by R. R. Vermilion for the appellant, and by S. M. Brewster, Attorney General, for the appellee, said cause is submitted on brief of counsel for both parties, and taken under advisement by the court.

14 And afterwards on the 10th day of April, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court Room in the City of Topeka, the following proceeding among others, was had and remains of record in words and figures as follows, to-wit:

15 In the Supreme Court of the State of Kansas, Saturday, April 10th, 1915.

No. 19558.

KANSAS CITY, FT. SCOTT & MEMPHIS RLY. CO., Appellant,
vs.
CHARLES H. SESSIONS, Sec. of State, etc., et al., Appellee.

Journal Entry of Judgment.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

16 Be it further remembered, that on the same day, to-wit: the 10th day of April, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Court's written opinion, together with the syllabus thereto, which opinion and syllabus are in words and figures as follows, to-wit:

17 No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,
v.
CHARLES H. SESSIONS, as Secretary of State, etc., Appellee.

Appeal from Shawnee County (Division No. 1).

Affirmed.

Syllabus by the Court.

MASON, *J.*:

A state may impose upon the franchise of corporate existence of a domestic corporation a tax measured by the amount of its capital stock, notwithstanding a large part of its business may consist of interstate commerce.

All Justices concurring, except Dawson, J., who did not sit.

18 No. 19558.

Statement.

This case, and others of a similar character, involve the validity of a statute requiring corporations to file annual reports and to pay certain annual fees. The provisions of the statute, so far as they are important to the decision of that question, follow:

"Section 1. Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state annually on or before March 31st, showing the condition of the corporation at the close of business on the 31st day of December next preceding the date of filing and in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation.
2. The location of its principal office.
3. The names of the president, secretary, treasurer and members of the board of directors, with post-office address of each.
4. The date of the annual election of officers of such corporation.
5. The amount of authorized capital stock and the par value of each share.
6. The amount of capital stock authorized, the amount of capital stock issued and paid up.
7. The nature and kind of business in which the company is engaged and its place or places of business.
8. A complete and detailed statement of the assets and liabilities of the corporation.
9. A complete list of stockholders with the post-office address of each and the number of shares held by each.
10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice-president and secretary or general manager of the corporation, and forwarded to the secretary of state. At the time of filing such annual re-
19 port it shall be the duty of every corporation, for profit, or for carrying on any kind of business incorporated under the laws of this state to pay to the secretary of state an annual fee as follows: When the paid up capital stock of the corporation does not exceed ten thousand dollars such annual fee shall be ten dollars; when the paid up capital stock exceeds ten thousand dollars but does not exceed twenty-five thousand dollars the annual fee shall be twenty-five dollars; when the paid up capital stock exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the paid up capital stock exceeds fifty thousand dollars but does not exceed one hundred thousand dollars the annual fee shall be one hundred dollars; when the paid up capital stock exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars the annual fee shall be one hundred twenty-five dollars; when the paid up capital stock exceeds two hundred and fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the paid up capital stock exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the paid up capital stock exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the paid up capital stock exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dollars; when the

paid up capital stock exceeds three million dollars but does not exceed five million dollars the annual fee shall be two thousand dollars; when the paid up capital stock exceeds five million dollars, the annual fee shall be two thousand five hundred dollars.

"Sec. 2. Every foreign corporation, for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital in this state, and subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas, shall make a report in writing to the secretary of state, annually, on or before March 31st, showing in such form as the secretary of state may prescribe, the following facts as of the 31st day of De-
20 cember next preceding the date of filing:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer, and members of the board of directors, with the post-office address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state of Kansas.

8. The name and location of its office or offices in Kansas, and the name- and address- of the officers or agents of the company in charge of its business in Kansas.

9. The value of the property owned and used by the company in Kansas, where situated, and the value of the property owned and used outside of Kansas and where situated.

10. A statement of the assets and liabilities of the corporation.

11. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice-president and secretary or general manager and forwarded to the secretary of state. Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of
21 such foreign corporation's issued capital stock as is devoted to its Kansas business and to be not less than ten dollars in any case, as follows: When the issued capital stock of the corporation used in Kansas does not exceed ten thousand dollars such annual fee shall be ten dollars; when the issued capital stock used in Kansas exceeds ten thousand dollars but does not exceed twenty-five thousand dollars the annual fee shall be twenty-five dollars; when

the issued capital stock used in Kansas exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the issued capital stock used in Kansas exceeds fifty thousand dollars but does not exceed one hundred thousand dollars the annual fee shall be one hundred dollars; when the issued capital stock used in Kansas exceeds one hundred thousand dollars but does exceed two hundred and fifty thousand dollars the annual fee shall be one hundred and twenty-five dollars; when the issued capital stock used in Kansas exceeds two hundred and fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the issued capital stock used in Kansas exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the issued capital stock used in Kansas exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the issued capital stock used in Kansas exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dollars; when the issued capital stock used in Kansas exceeds three million dollars but does not exceed five million dollars, the annual fee shall be two thousand dollars; when the issued capital stock used in Kansas exceeds five million dollars the annual fee shall be two thousand five hundred dollars.

"Sec. 5. In case any corporation required to file the report and pay the fee prescribed in sections one and two of this act shall fail or neglect to make such report within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of one hundred dollars, and an additional penalty of
22 five dollars per day for each day's omission after the time limited in this act for filing such report and paying such fee. Such penalty and the annual fee or fees required to be paid by the provisions of sections 1 and 2 of this act may be recovered by an action in the name of the state and on collection the fee shall be paid into the state treasury to the credit of the general revenue fund, and the penalty or penalties when collected shall be paid into the county school fund.

"Sec. 6. On complaint of the secretary of state that any corporation has failed to pay the annual fees prescribed by this act, it shall be the duty of the county attorney, or the attorney general, to institute such action in the district court of Shawnee county, Kansas, or of any county in which such corporation has an office or place of business. The failure of any domestic corporation to file the annual statement and to pay the annual fee herein provided for within ninety days of the time for filing and paying the same shall, in addition to other penalties, work the forfeiture of the charter of such corporation organized under the laws of this state and the Charter Board may at any time thereafter declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the district court of the proper county for the appointment of a receiver to close out the business of such corporation. The failure of any foreign

corporation to file such annual statement as heretofore provided within ninety days from the time provided for filing the same shall work a forfeiture of its right or authority to do business in this state and the Charter Board may at any time thereafter declare such forfeiture and shall forthwith publish such declaration in the official state paper. This section shall not be construed to restrict the state from invoking any other remedies provided by existing laws.

"Sec. 8. Any corporation shall have the right to be heard by the secretary of state upon the matter of determination of the amount of fees due under the provisions of this act. Any corporation aggrieved by the decision of the secretary of state may, within ten days, appeal to the governor, the attorney general and the state bank com-
23 missioner, whose decision in the matter shall be final.

"Sec. 9. If any corporation is aggrieved at the amount of the fee exacted of it under this act it may pay the same under protest, and such fee shall be kept by the secretary of state in a special fund, and the corporation may bring suit in the district court of Shawnee county, Kansas, to recover said fee or such part of it as may be just and equitable, but in no such case shall any costs be allowed, nor shall the secretary of state suffer any personal liability. After any such suit is determined, any balance of such fee remaining with the secretary of state shall be turned into the state treasury for the benefit of the general revenue fund.

"Sec. 10. [As amended by Sec. 1, ch. 136, Laws 1913.] All educational, religious, scientific and charitable corporations and all banking, insurance, building and loan associations or corporations and all corporations which are not organized or operated for pecuniary profit which are not doing business for pay, are exempt from the provisions of this act; provided, that no other corporations doing business in this state shall be exempt; and provided further that building and loan associations in order to secure such exemptions must list for taxation all mortgages by them owned in excess of capital stock." (Laws 1913, ch. 135.)

24 The opinion of the court was delivered by

MASON, *J.*:

The Kansas City, Fort Scott & Memphis Railway Company, a corporation organized under the laws of this state, paid under protest to the secretary of state in March, 1914, $2500, the sum required of it by the terms of the statute set out in the foregoing statement. (Laws 1913, ch. 135, § 1.) It then brought action in the district court to recover the amount, and being denied relief, appeals.

The plaintiff, a carrier doing interstate as well as local business, insists that the charge exacted of it is illegal because it places a burden upon interstate commerce, and upon property outside of Kansas. The fee collected is a tax upon the right of corporate existence—the franchise granted by the state to be a corporation—to do business with the advantages associated with that form of organization. It is measured by the amount of paid up stock, although not directly proportioned to it, the percentage being graduated up to a capital of $5,000,000, no increase being made after that amount is

exceeded. The plaintiff argues that the tax is one imposed upon interstate commerce, and upon property beyond the jurisdiction of Kansas, inasmuch as its size is regulated by the amount invested in a business a large part of which is carried on outside of the state, and between different states.

A corporation may be required by the state which created it to pay a tax upon the privilege of corporate existence which it has so obtained, notwithstanding it may be engaged in interstate commerce. Cases supporting that doctrine are collected and classified in a
25 note in 57 L. R. A. 79. The natural and obvious way of determining the amount of such a tax is to fix it with reference to the capital stock, which in a way measures the extent of the power conferred. That is the method ordinarily pursued. (37 Cyc. 817, note 58.) It does not necessarily afford an accurate measure of the relative value of the right which is taxed, but it affords a practical basis for a reasonable approximation. To distinguish between the amount of the capital which is invested locally, and that used abroad, or in interstate business, would be to apportion the tax according to the business done and not according to the capacity to do business in a particular way, which is the essence of the thing taxed. If such a distinction were necessary it would follow that a company engaged solely in interstate commerce could not be required to pay any tax whatever upon its franchise to exist as a corporation.

In Reading Railway Company v. Pennsylvania, 82 U. S. 284, the court upheld a state tax upon the gross receipts of a carrier, derived in part from interstate commerce, upon two grounds. One was that the receipts had become mingled with the general property of the state, a ground which was afterwards held to be untenable. (Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326.) The other ground was thus expressed:

"It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a meas-
26 ure of proximate value, or, if not, at least of the extent of enjoyment." (82 U. S. 296.)

Upon this proposition the Gross Receipts case was distinguished and not overruled, the court saying:

"The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania." (122 U. S. 342.)

There is obviously a good basis however for distinguishing between a tax upon the gross receipts of an interstate carrier, and a tax upon its corporate entity, graded according to its capital stock. In Henderson Bridge Company v. Kentucky, 166 U. S. 150, the court sustained a tax imposed by the state of Kentucky upon the "intangible property" of a corporation owning an interstate bridge, saying: "The only franchises treated here as the subject- of taxation

were those granted by the State of Kentucky." (p. 154.) A vigorous dissent, based on the contrary view, was written by Mr. Justice Field, who said: "I cannot bring my mind to the conclusion that the tax is only levied on the mere franchise to exist as a corporation conferred by the State of Kentucky." (p.166.) Clearly if the dissenting justices could have accepted that view of the matter, their objection to the decision would have been removed.

27 In Atlantic &c. Tel. Co. v. Philadelphia, 190 U. S. 160, the general rule was again declared, that "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States." (p. 163.)

In Western Union Tel. Co. v. Kansas, 216 U. S. 1, it was said: "If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered in a State, should, in addition, solicit orders for goods manufactured in and to be brought from another State for delivery, could the former State make it a condition of the right to engage in local business within its limits that the corporation pay a given per cent of all fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition." (p. 36.)

As already suggested, for the state to assess a tax gauged by the total capital stock, upon the right to exist as a corporation, which it has granted, is a very different thing from requiring a business to pay the state a percentage of what it earns by each transac-

28 tion undertaken, some of them being of an interstate character. A tax measured by the capital stock may in some situations be equivalent to a charge upon the whole business done, while in others it is not. In the case just quoted from the statute which was held void undertook to require a foreign corporation, as a condition to doing a purely local business in Kansas, to pay a fee fixed by a graduated percentage of its total capital stock, which was largely employed in business elsewhere, and in interstate commerce. There was no logical connection between the amount charged and the extent or value of the business done wholly within the state—the only matter over which the state had control. Here the amount of the tax has a direct relation to the scope and value of the privilege conferred and controlled by the state—the right to be a corporation.

We find nothing in the cases referred to or elsewhere that denies the power of a state to tax all domestic corporations, including those engaged in interstate commerce, upon their right of corporate existence, regulating the amount in the usual manner, by their capital stock. We conclude that such power exists, and that the statute in question is not subject to the objection stated.

The judgment is affirmed.

All Justices concurring; except Dawson, J., who did not sit.

29 And afterwards, on the 20th day of April, 1915, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a written stipulation and agreement signed by counsel for both parties setting forth the portions of the record to be incorporated in the certified transcript. Stipulation and agreement is in the words and figures as follows, to-wit:

30 In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State of the State of Kansas, and Substituted by an Order of Revivor as Appellee in the Stead of the said Charles H. Sessions, Secretary of State, Appellee.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, through S. M. Brewster, Attorney General of the State of Kansas, and attorney of record for J. T. Botkin, Secretary of State of the State of Kansas, defendant in error, and R. R. Vermilion and W. F. Lilleston, attorneys for The Kansas City, Fort Scott & Memphis Railway Company, plaintiff in error, that the Clerk of the Supreme Court of the State of Kansas, in preparing a transcript of the record in the above entitled case, to be transmitted to the Supreme Court of the United States, with the writ of error heretofore, on April 14, 1915, allowed and issued from the said Supreme Court of the United States, to the Supreme Court of the State of Kansas, in said case, may and shall incorporate in such transcript and transmit with said writ of error, the following portions of the record, which shall constitute the transcript of record on error herein, for the review of this case in the Supreme Court of the United States:

31 First. The appellant's abstract of record complete, including petition, demurrer, journal entry of proceedings and judgment.

Second. This stipulation with endorsements and filing marks.

Third. Copy of the journal entry of submission of the case in the Supreme Court of Kansas.

Fourth. Copy of the opinion and of the final judgment made and entered in said case, in the Supreme Court of Kansas.

Fifth. The certificate of the Clerk of the Supreme Court of Kansas that the foregoing is a full, true and complete transcript of the record and proceedings.

Sixth. 1. All papers and files in and concerning the proceedings in error for the review of this case by the Supreme Court of the

United States, including copy of petition for writ of error, allowance, endorsements and filing marks; copy of assignment of errors, endorsements and filing marks; copy of order of Chief Justice granting petition for writ of error, endorsements and filing marks; copy of bond with approval endorsed, endorsements and filing marks, together with Clerk's certificate of lodgment of the original bond in his office; original writ of error, allowance, endorsements and filing marks, together with Clerk's certificate of lodgment of the same and of copy thereof for defendant in error in his office; original citation, endorsements and filing marks, together with acknowledgments of service and entry of appearance.

2. Return of writ of error, together with statement of costs.

Seventh. Order of Revivor.

Eighth. Notice of Appeal and Proof of Service.

The Clerk will also index the record so to be transmitted.

32 It is stipulated and understood by and between the parties hereto that the above and foregoing portions of the record in this case are sufficient for the consideration of the questions to be reviewed in the Supreme Court of the United States and that the omitted portions are unnecessary to such consideration of said questions, and it is further stipulated and understood by and between the parties that the appeal of this case was properly taken to and perfected in the Supreme Court of the State of Kansas, and that on said appeal, the term of office of Charles H. Sessions, Secretary of State of the State of Kansas, expired, and he was succeeded in office by the appellee, J. T. Botkin, the Secretary of State of the State of Kansas, who was by order of revivor of the Supreme Court of Kansas, duly substituted as appellee in said case instead of said Charles H. Sessions, former Secretary of State, and said action was duly revived against and in the name of said J. T. Botkin, Secretary of State of the State of Kansas, as appellee, and that said appeal resulted in the final judgment and decision complained of by The Kansas City, Fort Scott & Memphis Railway Company, plaintiff in error, in said proceedings in error for the review of this case in and by the Supreme Court of the United States.

Dated this 20th day of April, 1915.

S. M. BREWSTER,
Attorney General of the State of Kansas, and Attorney of Record for J. T. Botkin, Secretary of State of the State of Kansas, Defendant in Error.

R. R. VERMILION &
W. F. LILLISTON,
Attorneys for The Kansas City, Fort Scott & Memphis Railway Company, Plaintiff in Error.

(Endorsed:) In The Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., Appellant,

vs. J. T. Botkin, etc., Appellee. Stipulation. Filed Apr. 20, 1915. D. A. Valentine, Clerk Supreme Court.

[Endorsed:] 19558. In the Supreme Court of the State of Kansas. The Kansas City, Fort Scott & Memphis Ry. Co., appellant, v. J. T. Botkin, etc., appellee. Stipulation. Filed April 20, 1915. D. A. Valentine, Clerk Supreme Court.

33 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said court do hereby certify that the above and foregoing is a true, full, complete and correct transcript of the record and proceedings in the above entitled case, and also of the opinion of the court rendered therein as the same now appears of record, and remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 23d day of April, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

34 Here follows:

The Original Petition for a Writ of Error and the allowance thereof.

The Original Assignments of Error.

A copy of the Bond for Appeal.

The Original Writ of Error and the Original Citation, with Proof of Service thereof.

35 In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
Appellant,
vs.
J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State of the State of Kansas, and Substituted by an Order of Revivor as Appellee in the Stead of the said Charles H. Sessions, Secretary of State, Appellee.

Petition for Writ of Error.

UNITED STATES OF AMERICA,
State of Kansas:

To the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, a corporation organized under the laws of the State of

Kansas, respectfully shows that on the 10th day of April, 1915, the Supreme Court of the State of Kansas, in the above entitled case pending in said court, wherein J. T. Botkin, Secretary of State of the State of Kansas, was appellee and your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, was appellant, made and entered a final judgment and decision in favor of said appellee and against the appellant, your petitioner; that this case was originally brought by said appellant, as plaintiff, in the District Court of Shawnee County, Kansas, against Charles H. Sessions,
36 Secretary of State of the State of Kansas, as defendant, who filed in said District Court a general demurrer to said plaintiff's petition therein, which general demurrer was by the consideration and judgment of said District Court sustained, and judgment was rendered by said District Court that said demurrer be sustained and that the plaintiff in said court, your petitioner herein, take nothing by said action and that it pay the costs of said suit. That an appeal from the said judgment of said District Court, to the Supreme Court of the State of Kansas, was duly taken and perfected by the plaintiff therein, this appellant, your petitioner, and during the pendency of said suit and said appeal, in the said Supreme Court of the State of Kansas, the term of office of the said Charles H. Sessions, Secretary of State of the State of Kansas, expired and he was succeeded in office by the appellee, J. T. Botkin, as Secretary of State of the State of Kansas, who was by the order and judgment of the Supreme Court of the State of Kansas, duly substituted as appellee instead of the said Charles H. Sessions, former Secretary of State, and said action was revived against and in the name of the said J. T. Botkin, Secretary of State of the State of Kansas; that said final judgment and decision of the Supreme Court of the State of Kansas, in said case, affirmed said judgment of the District Court of Shawnee County, Kansas, as will particularly appear from the record in this case. That in said final judgment and decision, as well as in the proceedings had prior thereto in said case, certain manifest errors were committed to the prejudice of your petitioner, which feels itself aggrieved by said final decision and judgment, all of which will more particularly appear from the assignment of errors filed with this petition. That said Supreme Court of the State of Kansas is the highest court of the State of Kansas in which a decision in said case and matter could be had, and is the highest court and the court of last resort in said State of Kansas.

That in said case and in the Supreme Court of the State of Kansas, your petitioner duly drew in question the validity
37 of Chapter 135 of the Session Laws of the State of Kansas of 1913, the same being an act of the Legislature of the State of Kansas entitled, "An Act to Require Corporations to File Annual Reports with the Secretary of State and to Pay Certain Annual Fees, and Repealing Section 1726 General Statutes of Kansas 1909." And your petitioner also duly and particularly drew in question the validity of said statute, in said case, insofar as it applied to corporations organized under the laws of the State of

Kansas, whose capital stock was invested in railroads extending into and through the State of Kansas and other states, which was used in carrying on interstate commerce, and more particularly the provisions of said statute applying to corporations organized under the laws of the State of Kansas, whose capital stock was invested in property used in carrying on interstate commerce, on the ground that said statute and said provisions, and each of them, were repugnant to that portion of Section 8 of Article I. of the Constitution of the United States which provides that Congress shall have power, "To regulate commerce with foreign nations and among the several states and with the Indian tribes," and on the ground that the same constituted an unconstitutional burden on interstate commerce, and on the ground that said law, and each of the provisions thereof, were repugnant to the Fourteenth Amendment to the Constitution of the United States, and particularly to the provisions of Section 1 of Article XIV. thereof. That said final decision and judgment of the Supreme Court of the State of Kansas was in favor of the validity and constitutionality of said statute of Kansas and the said provisions thereof with reference to corporations organized under the laws of the State of Kansas. That in said case and in the Supreme Court of the State of Kansas, your petitioner claimed that said statute and said provisions thereof, and each of them, constituted and constitute a burden on interstate commerce and an attempt to regulate commerce among the several
38 states of the United States, and deprived your petitioner of liberty and property without due process of law and denied to your petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and said final judgment and decision of the Supreme Court of the State of Kansas was against your petitioner's said claims, and each of them, and was against rights, privileges and immunities claimed by your petitioner in and throughout said case and in the Supreme Court of the State of Kansas, under Section 8 of Article I., of the Constitution of the United States and under the Fourteenth Amendment to the Constitution of the United States; all of which will more particularly appear from the record and proceedings in said case. Your petitioner further represents that said final decision and judgment of the Supreme Court of Kansas was and is erroneous and contrary to Section 8 of Article I. of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States and each of them.

Wherefore, your petitioner, The Kansas City, Fort Scott & Memphis Railway Company, prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and the Judges thereof, to the end that the record in this case and matter may be removed into the Supreme Court of the United States, and each and all of the errors complained of by your petitioner, be examined and corrected and said judgment reversed; and for citation, stay and supersedeas, and for such other processes and relief as will enable your petitioner to obtain

39 a review of this case in, and a correction of said errors, and each of them, by the Supreme Court of the United States, and your petitioner will ever pray.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
By R. R. VERMILION,
W. F. LILLISTON,
Attorneys for said Petitioner.

Allowed at Topeka, Kansas, this April 14, 1915.
W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Railway Company, appellant, vs. J. T. Botkin, etc., appellee. Petition for Writ of Error. Filed Apr. 14, 1915. D. A. Valentine, Clerk Supreme Court.

40 In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,
vs.
J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State, etc., Appellee.

Order Granting Petition for Writ of Error.

Now, on this 14th day of April, 1915, there are presented, in this case, to the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, at chambers, a petition filed herein for a Writ of Error and an assignment of errors filed herein and accompanying said petition, of and by the appellant, The Kansas City, Fort Scott & Memphis Railway Company, praying for the allowance of a Writ of Error from the Supreme Court of the United States, to the Supreme Court of the State of Kansas, to review the final judgment and decision of the Supreme Court of the State of Kansas heretofore rendered and made on April 10, 1915, in the above entitled case; and upon reading said petition for Writ of Error and said assignment of errors, and it appearing from said petition and assignment of errors and the record in the case, that a proper case for the granting of said petition and for the allowance of said Writ of Error is duly presented:

41 It is therefore ordered that the said petition for a Writ of Error be and it is hereby granted; that said Writ of Error be and it is hereby allowed upon said appellant, The Kansas City, Fort Scott & Memphis Railway Company, giving a bond according

to law, in the sum of $500.00, with good and sufficient sureties, which said bond when approved shall operate as a supersedeas bond and stay of execution and of the mandate to the lower court.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., appellant, vs. J. T. Botkin, etc., appellee. Order granting petition for Writ of Error.

42 In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,
vs.
J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State, etc., Appellee.

Assignment of Errors.

Comes now The Kansas City, Fort Scott & Memphis Railway Company, the appellant named in the above entitled action, and files herein the following assignment of errors which it will present to the Supreme Court of the United States, and upon which it will rely in its prosecution of the Writ of Error issued or to be issued in this case, from the Supreme Court of the United States to the Supreme Court of Kansas, and it avers that the Supreme Court of the State of Kansas, being the highest court of law or equity of the State of Kansas in which a decision could be had in said suit, on the 10th day of April, 1915, rendered a final judgment in the above entitled action, which was duly entered of record, affirming the judgment of the District Court of Shawnee County, Kansas,
43 in favor of the defendant and against plaintiff, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the petition of the plaintiff, this appellant, and for costs, all as shown by the record in this case.

In the rendition of said judgment by said Supreme Court of the State of Kansas, the following adverse and manifest errors were committed by the Supreme Court of the State of Kansas, to the great damage and prejudice of this appellant, which are apparent on the face of the record, and for the purpose of having the same reviewed and said final judgment reversed and corrected in and by the Supreme Court of the United States, said appellant, The Kansas City, Fort Scott & Memphis Railway Company, makes the following assignment of errors:

1. The Supreme Court of the State of Kansas erred in rendering

said final judgment affirming the judgment of the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the petition of the plaintiff, this appellant, and for costs.

2. The said Supreme Court of the State of Kansas erred in holding and adjudging that the judgment rendered against this appellant by the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the District Court of Shawnee
44 County, Kansas, to the petition of the plaintiff, this appellant, and for costs, was a valid and legal judgment.

3. Said Supreme Court of the State of Kansas erred in holding and adjudging that the petition of the plaintiff, this appellant, filed by it in the District Court of Shawnee County, Kansas, in said case, did not state facts sufficient to constitute a cause of action.

4. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of the State of Kansas of 1913 constitutes a valid law and is not in conflict with that portion of Article I. of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

5. The Supreme Court of the State of Kansas erred in holding and adjudging that said Chapter 135 of the laws of Kansas of 1913, as applied to and sought to be enforced against the capital stock of The Kansas City, Fort Scott and Memphis Railway Company invested in railroad property situated in Kansas and other states and with which interstate commerce is carried on, constitutes a valid law and is not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

45 6. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 was not a burden on or an attempt to regulate commerce among the several states.

7. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913 did not deprive the appellant, The Kansas City, Fort Scott & Memphis Railway Company, of property, without due process of law.

8. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas, of 1913 did not deny to this appellant, The Kansas City, Fort Scott & Memphis Railway Company, the equal protection of the law.

9. Said Supreme Court of the State of Kansas erred in holding and adjudging that those provisions of Chapter 135 of the Session Laws of Kansas of 1913, relating to corporations organized under

the laws of the State of Kansas, and whose capital stock was invested in property used in carrying on interstate commerce, were not a burden upon, or an attempt to regulate, the commerce in which this appellant was and is engaged among the several states, as alleged in its petition filed in the District Court of Shawnee County, Kansas.

10. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, insofar as it applied to corporations organized under the laws of the State of Kansas, whose capital stock was invested in
46 railroads extending into and through the State of Kansas and other states, which were used in carrying on interstate commerce, was not a burden upon or an attempt to regulate commerce among the several states.

11. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of Kansas of 1913, insofar as it applied to corporations organized under the laws of the State of Kansas, whose capital stock was invested in railroads extending into and through the State of Kansas and other states, which were used in carrying on interstate commerce, was not a burden upon or an attempt to regulate commerce among the several states, in which this appellant was and is engaged.

Wherefore, as well for the foregoing as for other plain errors apparent on the face of the record, this appellant, The Kansas City, Fort Scott & Memphis Railway Company prays that the said errors, and each of them, be corrected by the Supreme Court of the United States, and said judgment so rendered by the Supreme Court of the State of Kansas, in which it affirmed the judgment of the District Court of Shawnee County, Kansas, be reversed, set aside and held for naught, and for costs and such other and further relief as it may be entitled to in the premises.

R. R. VERMILION,
W. F. LILLISTON,
Attorneys for Appellant The Kansas City, Fort Scott & Memphis Railway Company.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., appellant, vs. J. T. Botkin, etc., appellee. Assignment of Errors. Filed Apr. 14, 1915. D. A. Valentine, Clerk Supreme Court.

47 **Copy.**

In the Supreme Court of the State of Kansas.

No. 19558.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, Appellant,

vs.

J. T. BOTKIN, Secretary of State of the State of Kansas, Successor in Office to Charles H. Sessions, Secretary of State, etc., Appellee.

Bond.

Know all men by these presents that we, The Kansas City, Fort Scott & Memphis Railway Company, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto J. T. Botkin, Secretary of State of the State of Kansas, in the sum of Five Hundred Dollars, to be paid to said J. T. Botkin, Secretary of State of the State of Kansas, to the payment of which well and truly to be made, we bind ourselves, our successors, trustees and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this April 13, 1915.

Whereas the above named appellant The Kansas City, Fort Scott & Memphis Railway Company has prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judg-
48 ment rendered in the above entitled action, by the Supreme Court of the State of Kansas,

Now, therefore, the condition of this obligation and bond is such that if the above named appellant, The Kansas City, Fort Scott & Memphis Railway Company, shall prosecute its said Writ of Error to effect and answer all costs and damages, if it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force and effect.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY,
Principal,

By R. R. VERMILION,
Its Duly Authorized Agent and Attorney.

UNITED STATES FIDELITY & GUARANTY COMPANY, *Surety,*

By A. J. CHRISTMAN,
Its Duly Authorized Agent and Attorney in Fact. [SEAL.]

The above bond is hereby approved, this April 14, 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[SEAL.] D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Indorsed: In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., Appellant, vs. J. T. Botkin, etc., Appellee. Bond. Filed April 14, 1915. D. A. Valentine, Clerk Supreme Court.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Kansas, before you, being the highest court of law and equity of the said state in which a decision could be had in said suit between The Kansas City, Fort Scott & Memphis Railway Company and J. T. Botkin, Secretary of State of the State of Kansas, wherein was drawn in question the validity of a statute of said State of Kansas on the ground that said statute was repugnant to the Constitution of the United States and more particularly to that portion of Article I. of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and more particularly to the Fourteenth Amendment to said Constitution of the United States; and the decision was in favor of the validity of said state statute; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and more particularly Section 1 of the Fourteenth Amendment to the Constitution of the United States, and more particularly the above quoted portion of Article I. of the Constitution of the United States, and the decision was against the right, privilege and immunity specially set up and claimed by said The Kansas City, Fort Scott & Memphis Railway Company; a manifest error hath hap-

50 pened to the great damage of the said The Kansas City, Fort Scott & Memphis Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the said Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 14th day of April, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk of the District Court of the United States for the District of Kansas, First Division.

Allowed at Topeka, Kansas, on this April 14, 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] Copy. In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., appellant, vs. J. T. Botkin, etc., appellee. Writ of Error. Filed Apr. 14, 1915. D. A. Valentine, Clerk Supreme Court.

51 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. T. Botkin, Secretary of State of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Kansas, wherein The Kansas City, Fort Scott & Memphis Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, The Kansas City, Fort Scott & Memphis Railway Company, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Kansas, this 14th day of April, 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

52 I, J. T. Botkin, Secretary of State of the State of Kansas, defendant in error named in the foregoing citation and the case therein mentioned, hereby acknowledge due and legal service of the above citation upon me, the said defendant in error, and hereby enter appearance in the Supreme Court of the United States, in said case.

Dated at Topeka, Kansas, this April 14, 1915.

[Seal Secretary of State, State of Kansas.]

J. T. BOTKIN,
Secretary of State of the State of Kansas, Defendant in Error.

I, the undersigned attorney of record for the defendant in error named in the foregoing citation and the case therein mentioned,

do hereby acknowledge due and legal service of the foregoing and attached citation upon me and upon said defendant in error, and hereby enter appearance in the Supreme Court of the United States.

Dated at Topeka, Kansas, this April 14, 1915.

S. M. BREWSTER,
Attorney General of the State of Kansas, Attorney of Record for J. T. Botkin, Secretary of State of the State of Kansas, Defendant in Error.

[Endorsed:] In the Supreme Court of the State of Kansas. No. 19558. The Kansas City, Fort Scott & Memphis Ry. Co., appellant, vs. J. T. Botkin, etc., appellee. Citation.

53 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, Clerk of said court, do hereby certify that there was lodged with me as such clerk on the 14th day of April, 1915, in the above entitled case,

1. The original Bond, of which a copy is herein set forth.
2. Two copies of the Writ of Error, as herein set forth; one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office in Topeka, Kansas, this 23d day of April, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

54 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, in the City of Topeka, Kansas, this 23d day of April, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 24,702. Kansas Supreme Court. Term No. 450. The Kansas City, Fort Scott & Memphis Railway Company, plaintiff in error, vs. J. T. Botkin, Secretary of State of the State of Kansas. Filed May 3d, 1915. File No. 24,702.

19

No. 450.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

R. R. VERMILION,
Attorney for Plaintiff in Error.

W. F. EVANS,
Of Counsel.

SUBJECT INDEX.

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ALPHABETICAL INDEX OF STATUTES AND CASES.

No. 450.

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VS.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT OF CASE.

This is a writ of error to the Supreme Court of Kansas, for the purpose of having reviewed the judgment of that court affirming the judgment of the District Court of Shawnee County, Kansas, sustaining a demurrer to the petition of the plaintiff in that court, plaintiff in error in this court.

This suit was instituted in the District Court of Shawnee County, Kansas, by the plaintiff in error, against Charles H. Sessions, then Secretary of State of the State of Kansas, to recover the sum of Twenty-five Hundred Dollars paid by the plaintiff in error to the Secretary of State under protest, as a corporation tax demanded and received under the provisions of Chapter 135 of the Session Laws of Kansas of 1913. The petition, which stated the case of the plaintiff in that suit, is as follows:

"Plaintiff for its cause of action, states that the defendant is the duly elected, qualified and acting Secretary of State of the State of Kansas. That the plaintiff is now and for more than ten years last past has been a corporation duly organized and existing under and by virtue of the laws of the State of Kansas with an authorized capital stock of 600,000 shares of the par value of One Hundred ($100.00) Dollars each, of which has been issued paid up and are now outstanding, 316,600 shares of One Hundred ($100.00) Dollars each. That the plaintiff by its charter was and is authorized to own, construct, operate and maintain a railroad and railroads in the State of Kansas and in other states. That the plaintiff by and with the means derived from the issuing and sale of the said 316,600 shares of One Hundred ($100.00) Dollars each of its capital stock has constructed and acquired a line of railroad and railroads extending from Kansas City, in the State of Missouri, south to and through the State of Kansas, and

into and across the States of Oklahoma, Missouri, Arkansas and Tennessee, with all its necessary side tracks, turn-outs, stations, shops and terminal facilities necessary for the successful operation of said railroad system. That said railroad and each and every part thereof has been for more than ten years last past, and is now leased to the St. Louis & San Francisco Railroad Company, which company or the receivers who have been duly appointed for its railroads and property, have during the period herein named, and are now operating said railroad system and each and every part thereof as common carriers of passengers and property for hire and engaged in interstate commerce between the several states hereinbefore named. That all of the said capital stock of the plaintiff so issued and outstanding is, and has been for more than ten years last past, invested in and used in acquiring said above described railroad line and lines extending into and through the above named states which have been during all the times aforesaid and now are being used in carrying on interstate commerce. That the defendant herein as Secretary of State of the State of Kansas has demanded of the plaintiff herein, the payment to the said defendant of the sum of Two Thousand Five Hundred ($2500.00) Dollars as a corporation tax or fee on all the capital stock of the plaintiff herein so issued and outstanding and invested as aforesaid. That the plaintiff herein, protesting that the said demand of the defendant for the payment of said sum as such corporation tax and fee was and is illegal and unauthorized,

and that the plaintiff herein was under no legal obligation to pay said amount to the defendant, did, on the 31st day of March, A. D., 1914, pay to the said defendant, under protest and duress and against its will, said sum of Two Thousand Five Hundred ($2,500.00) Dollars, which sum was received by the defendant and is now retained by him.

"Plaintiff alleges that said sum of money was demanded of it by the defendant, and was received from it by the defendant under the claim and pretense on the part of the defendant that the provisions of Chapter 135 of the Session Laws of the State of Kansas enacted by the Legislature of said state at the session of 1913, authorized and empowered the defendant to demand and receive of the plaintiff herein, said sum of money as a corporation tax and fee as aforesaid, and under the claim that the plaintiff herein was legally obligated under the provision of said Chapter 135 to pay the same, and that by the provisions of said law so enacted by the Legislature of the State of Kansas, every corporation organized under the laws of the State of Kansas for profit, is required to pay to the Secretary of State an annual fee upon the amount of its paid-up capital stock, which amount is governed by the amount of such paid-up capital stock, and by said law it is provided that when the paid-up capital stock of a corporation organized under the laws of the State of Kansas exceeds $5,000,000.00, the annual fee shall be $2500.00.

"Plaintiff alleges that its paid-up capital stock exceeds the sum of Five Million ($5,000,000.00) Dollars

and equals the sum of Thirty-one Million Six Hundred Thousand Six Hundred ($31,600,600.00) Dollars.

"Plaintiff alleges that the said capital stock of this plaintiff is now and has been at all times during the last ten years invested in said line of railroad which extends into and across the several states above named, more than three-fourths of which property is situated outside of the State of Kansas, and more than three-fourths of said capital stock is now and was at all times above stated invested in and devoted to said business outside of the State of Kansas.

"Plaintiff alleges that the provisions of said Chapter 135 of the Session Laws of the State of Kansas of 1913, are invalid and did not authorize the defendant to demand and receive of the plaintiff the aforesaid sum of money for the aforesaid purpose, and that the plaintiff herein was under no legal obligation to pay said sum for said purpose. That the provisions of said Chapter 135 of the Laws of 1913 are in conflict with and are repugnant to that provision of Article I, of the Constitution of the United States which provides that Congress shall have power "To regulate Commerce with foreign nations and among the several states and with the Indian tribes." That the Congress of the United States has enacted laws regulating commerce between the several states and between the states above referred to into and through which the line of railroad of the plaintiff herein extends.

"Plaintiff alleges that at the time the defendant demanded of this plaintiff the payment of said sum, and

at the time he received the same, defendant well knew the same was illegal and that he had no lawful right to demand and receive the same. Plaintiff herein, under the fear that if the said law contained in said Chapter 135 of the Session Laws of 1913, should perchance be held valid, plaintiff would suffer the severe penalties prescribed in said law and have its charter revoked in case it did not pay said sum, and by reason of said demand, paid the same, protesting at the time that it was illegal and should not be exacted from plaintiff.

"Plaintiff alleges that said Chapter 135 of the Session Laws of 1913, of the State of Kansas attempts to, and if enforced will impose a burden on interstate commerce, in that it exacts the payment of a fee and places a tax upon the capital stock of the plaintiff herein, which is now and at all times hereinbefore referred to was used and employed in carrying on commerce between the several states hereinbefore named, and if enforced would enable the State of Kansas and the defendant herein to levy and collect a tax from the plaintiff herein on its property situated outside of and beyond the limits of the State of Kansas, and which is used in carrying on interstate commerce and on its capital stock devoted to carrying on interstate commerce outside the State of Kansas.

"Wherefore, plaintiff prays judgment against the defendant for the aforesaid sum of Two Thousand Five Hundred ($2,500.00) Dollars, with interest thereon at the rate of six per cent per annum from the 31st day of March, 1914, together with the costs of this suit" (Record 6, 7, 8).

To this petition the defendant in that court, the Secretary of State, filed his demurrer as follows:

"Now comes the defendant herein and demurs to the plaintiff's petition, for the reason that said petition does not state facts sufficient to constitute a cause of action" (Record 8).

The demurrer was argued and submitted to the court and by the court sustained, and the plaintiff declining to plead further, judgment was rendered for the defendant.

The case was then taken on appeal to the Supreme Court of Kansas and there argued and submitted, and on the 4th day of March, 1915, judgment was rendered in the Supreme Court affirming the judgment of the District Court of Shawnee County (Record 11).

A petition in error was sued out of this court, directed to the Supreme Court of Kansas, and the case brought here for review. The plaintiff in error is a railroad corporation, organized and existing under and by virtue of the laws of the State of Kansas, and has been such since the year 1901. It has an authorized capital stock of 600,000 shares of the par value of One Hundred Dollars ($100) each, of which there has been issued and paid up and is now outstanding, 316,600 shares, of the par value of One Hundred Dollars ($100) each. By its charter it is authorized to construct, operate and maintain a railroad and railroads in the State of Kansas and other states. With the money derived from

its issued and paid up capital stock, as alleged in its petition, it had constructed and acquired a line of railroad and railroads extending from Kansas City in the State of Missouri, south to and through the State of Kansas and into and across the states of Oklahoma, Missouri, Arkansas and Tennessee, with all necessary side-tracks, turn outs, stations, depots and terminal facilities.

In its petition it alleged that it was using said railroads and property in carrying on interstate commerce in the various states above named and that more than three-fourths of its property, represented by its capital stock, was situated outside of the State of Kansas. The questions presented by the plaintiff in error in this court and also in the Supreme Court of the State of Kansas, were that the property of the plaintiff in error, which was represented by its capital stock, was situated in several states, three-fourths of which was beyond the boundaries of the State of Kansas and was being used in interstate commerce, and that Chapter 135 of the Session Laws of 1913, under which the tax was demanded and paid, was, as applied to the plaintiff in error and its property, a violation of the commerce clause of the Constitution of the United States as embodied in Section 8 of Article I, which provides that Congress shall have power "To regulate commerce with foreign nations and among the several states and with the Indian tribes"; also a violation of that provision of the Fourteenth Amendment to the Constitution of the United States, which provides that "No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law."

The act under which said tax was exacted, is as follows:

"Section 1. Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state annually on or before March 31st, showing the condition of the corporation at the close of business on the 31st day of December next preceding the date of filing and in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation.

2. The location of its principal office.

3. The name of the president, secretary, treasurer and members of the board of directors, with post-office address of each.

4. The date of the annual election of officers of such corporation.

5. The amount of authorized capital stock and the par value of each share.

6. The amount of capital stock authorized, the amount of capital stock issued and paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business.

8. A complete and detailed statement of the assets and liabilities of the corporation.

9. A complete list of stockholders with the postoffice address of each and the number of shares held by each.

10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice-president and secretary or general manager of the corporation, and forwarded to the secretary of state. At the time of filing such annual report it shall be the duty of every corporation, for profit, or for carrying on any kind of business incorporated under the laws of this state to pay to the secretary of state an annual fee as follows: When the paid up capital stock of the corporation does not exceed ten thousand dollars such annual fee shall be ten dollars; when the paid up capital stock exceeds ten thousand dollars but does not exceed twenty-five thousand dollars the annual fee shall be twenty-five dollars; when the paid up capital stock exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the paid up capital stock exceeds fifty thousand dollars but does not exceed one hundred thousand dollars the annual fee shall be one hundred dollars; when the paid up capital stock exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars the annual fee shall be one hundred twenty-five dollars; when the paid up capital stock exceeds two hundred and fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the paid up capital stock exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the paid up capital stock exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the paid up capital stock exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dol-

lars; when the paid up capital stock exceeds three million dollars but does not exceed five million dollars the annual fee shall be two thousand dollars; when the paid up capital stock exceeds five million dollars, the annual fee shall be two thousand five hundred dollars."

"Sec. 2. Every foreign corporation, for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital in this state, and subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas, shall make a report in writing to the secretary of state, annually, on or before March 31st, showing in such form as the secretary of state may prescribe, the following facts as of the 31st day of December next preceding the date of filing:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer, and members of the board of directors, with the post office address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the State of Kansas.

8. The name and location of its office or offices in Kansas, and the name—and address—of

the officers or agents of the company in charge of its business in Kansas.

9. The value of the property owned and used by the company in Kansas, where situated, and the value of the property owned and used outside of Kansas and where situated.

10. A statement of the assets and liabilities of the corporation.

11. The change or changes, if any, in the above particulars made since the last annual report.

"Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president or vice-president and secretary or general manager and forwarded to the secretary of state. Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business and to be not less than ten dollars in any case, as follows: When the issued capital stock of the corporation used in Kansas does not exceed ten thousand dollars such annual fee shall be ten dollars; when the issued capital stock used in Kansas exceeds ten thousand dollars but does not exceed twenty-five thousand dollars the annual fee shall be twenty-five dollars; when the issued capital stock used in Kansas exceeds twenty-five thousand dollars but does not exceed fifty thousand dollars the annual fee shall be fifty dollars; when the issued capital stock used in Kansas exceeds fifty thousand dollars but

does not exceed one hundred thousand dollars the annual fee shall be one hundred dollars; when the issued capital stock used in Kansas exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars the annual fee shall be one hundred and twenty-five dollars; when the issued capital stock used in Kansas exceeds two hundred fifty thousand dollars but does not exceed five hundred thousand dollars the annual fee shall be two hundred and fifty dollars; when the issued capital stock used in Kansas exceeds five hundred thousand dollars but does not exceed one million dollars the annual fee shall be five hundred dollars; when the issued capital stock used in Kansas exceeds one million dollars but does not exceed two million dollars the annual fee shall be one thousand dollars; when the issued capital stock used in Kansas exceeds two million dollars but does not exceed three million dollars the annual fee shall be fifteen hundred dollars; when the issued capital stock used in Kansas exceeds three million dollars but does not exceed five million dollars, the annual fee shall be two thousand dollars; when the issued capital stock used in Kansas exceeds five million dollars the annual fee shall be two thousand five hundred dollars.

"Sec. 5. In case any corporation required to file the report and pay the fee prescribed in sections one and two of this act shall fail or neglect to make such report within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of one hundred dollars, and an additional penalty of five dollars per day for each day's omission after the time limited in this act for filing such report and paying such fee. Such penalty and the annual fee or fees required to be paid by the provisions of Sections 1 and 2 of this act may be recovered by an action in the name of the state and on collection the fee shall be paid into the state

treasury to the credit of the general revenue fund, and the penalty or penalties when collected shall be paid into the county school fund.

"Sec. 6. On complaint of the secretary of state that any corporation has failed to pay the annual fees prescribed by this act, it shall be the duty of the county attorney, or the attorney general, to institute such action in the District Court of Shawnee County, Kansas, or of any county in which such corporation has an office or place of business. The failure of any domestic corporation to file the annual statement and to pay the annual fee herein provided for within ninety days of the time for filing and paying the same shall, in addition to other penalties, work the forfeiture of the charter of such corporation organized under the laws of this state and the Charter Board may at any time thereafter declare the charter of such corporation forfeited; and upon the declaration of any such forfeiture it shall be the duty of the attorney general to apply to the District Court of the proper county for the appointment of a receiver to close out the business of such corporation. The failure of any foreign corporation to file such annual statement as heretofore provided within ninety days from the time provided for filing the same shall work a forfeiture of its right or authority to do business in this state and the Charter Board may at any time thereafter declare such forfeiture and shall forthwith publish such declaration in the official state paper. This section shall not be construed to restrict the state from invoking any other remedies provided by existing laws.

"Sec. 8. Any corporation shall have the right to be heard by the secretary of state upon the matter of determination of the amount of fees due under the provisions of this act. Any corporation ag-

grieved by the decision of the secretary of state may, within ten days, appeal to the governor, the attorney general and the state bank commissioner, whose decision in the matter shall be final.

"Sec. 9. If any corporation is aggrieved at the amount of the fee exacted of it under this act it may pay the same under protest, and such fee shall be kept by the secretary of state in a special fund, and the corporation may bring suit in the District Court of Shawnee County, Kansas, to recover said fee or such part of it as may be just and equitable, but in no such case shall any costs be allowed, nor shall the secretary of state suffer any personal liability. After any such suit is determined, any balance of such fee remaining with the secretary of state shall be turned into the state treasury for the benefit of the general revenue fund.

"Sec. 10. (As amended by Sec. 1, Ch. 136, Laws 1913.) All educational, religious, scientific and charitable corporations and all banking, insurance, building and loan associations or corporations and all corporations which are not organized or operated for pecuniary profit which are not doing business for pay, are exempt from the provisions of this act; provided, that no other corporations doing business in this state shall be exempt; and provided further that building and loan associations in order to secure such exemptions must list for taxation all mortgages by them owned in excess of capital stock." (Laws 1913, Ch. 135.)

The demurrer submitted by the defendant in the trial court, to the petition of the plaintiff, admitted all the facts in the petition, which were well pleaded. It was, therefore, admitted by the demurrer that the capital

stock of the company was at the time said suit was brought and had been at all times during ten years prior thereto, invested in a line of railroad which extends into and across the several states named, more than three-fourths of which property was situated outside of the State of Kansas, and more than three-fourths of which said capital stock was at all times stated invested in and devoted to said business outside of the State of Kansas. It was also admitted by the demurrer that said railroad was at the time of the bringing of the suit and for more than ten years prior thereto had been, operated in carrying on the business of a common carrier of passengers and property for hire and engaged in interstate commerce between the several states therein named. The demurrer also admitted that the capital stock of the plaintiff in error had been invested in and used in acquiring said railroad line and lines extending into and through the states named (Record, pp. 6, 7, 8).

During the pendency of the suit on appeal in the Supreme Court of Kansas, the term of office of Charles H. Sessions, Secretary of State, expired and the defendant in error, J. T. Botkin, succeeded him in office, and the action was duly revived against the present officer (Record, 9, 10).

SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Kansas erred in rendering said final judgment affirming the judgment of the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the petition of the plaintiff, this appellant, and for costs.

2. The said Supreme Court of the State of Kansas erred in holding and adjudging that the judgment rendered against this appellant by the District Court of Shawnee County, Kansas, in favor of the defendant and against the plaintiff, sustaining the general demurrer filed by the defendant in the District Court of Shawnee County, Kansas, to the petition of the plaintiff, this appellant, and for costs, was a valid and legal judgment.

3. Said Supreme Court of the State of Kansas erred in holding and adjudging that the petition of the plaintiff, this appellant, filed by it in the District Court of Shawnee County, Kansas, in said case, did not state facts sufficient to constitute a cause of action.

4. Said Supreme Court of the State of Kansas erred in holding and adjudging that Chapter 135 of the Session Laws of the State of Kansas of 1913, constitutes a valid law and is not in conflict with that portion of

Article I of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

5. The Supreme Court of the State of Kansas erred in holding and adjudging that said Chapter 135 of the laws of Kansas of 1913, as applied to and sought to be enforced against the capital stock of The Kansas City, Fort Scott and Memphis Railway Company invested in railroad property situated in Kansas and other states and with which interstate commerce is carried on, constitutes a valid law and is not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

6. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, was not a burden on or an attempt to regulate commerce among the several states.

7. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas of 1913, did not deprive the appellant, The Kansas City, Fort Scott & Memphis Railway Company, of property, without due process of law.

8. Said Supreme Court of the State of Kansas erred in holding that Chapter 135 of the Session Laws of Kansas, of 1913, did not deny to this appellant, The Kansas City, Fort Scott & Memphis Railway Company, the equal protection of the law.

9. Said Supreme Court of the State of Kansas erred in holding and adjudging that those provisions of Chapter 135 of the Session Laws of Kansas of 1913, relating to corporations organized under the laws of the State of Kansas, and whose capital stock was invested in property used in carrying on interstate commerce, were not a burden upon, or an attempt to regulate, the commerce in which this appellant was and is engaged among the several states, as alleged in its petition filed in the District Court of Shawnee County, Kansas.

BRIEF OF ARGUMENT.

The first question presented by this proceeding in error is, whether or not the provisions of Chapter 135 of the Session Laws of Kansas of 1913, as applied to the business conducted by the plaintiff in error, are in violation of the commerce clause of the Federal Constitution.

The first, second, third, fourth and sixth assignments of error relate to this question and will be argued together.

It is the contention of the plaintiff in error that its property which is represented by its capital stock, was used in carrying on interstate commerce, and when it was sought to require the payment of a tax of $2500.00 on its capital stock, it was placing a tax upon the instrumentalities with which it carried on interstate commerce.

The Tax Involved is Not in Lieu of Property Tax.

There is no claim or pretense that the sum exacted was the ordinary tax upon the property of the corporation situated in Kansas. Its property had been assessed and taxed under a different provision of the statutes. That tax had been paid in common with taxes on all other like property. The tax provided for by Chapter 135, however, was a separate and additional tax, aside from that which plaintiff in error had been required to pay upon its property situated in Kansas.

It is the contention of the plaintiff in error that the law referred to, insofar as it relates to a corporation organized under the laws of the State of Kansas and doing interstate business in the manner described in the petition, is in conflict with the commerce clause of the Constitution of the United States and is specifically condemned by the decisions of this court, both in the case of *The Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1, and in the case of *Pullman Company* v. *Kansas,* 216 U. S. 56.

The statute provides no method for ascertaining proportion of stock of domestic corporations devoted to Kansas business.

The Legislature, in Chapter 135 of the Session Laws of 1913, evidently did not fully comprehend the ruling of this court in the Telegraph and Pullman cases. It is provided in the Laws of Kansas of 1913, p. 223, that foreign corporations shall pay an annual fee upon the amount of their capital stock devoted to business in Kansas. The Act provides the method by which the amount of the stock of foreign corporations devoted to business in Kansas, may be ascertained. This provision seems to be in harmony with the ruling of this court in a number of cases. But no provision is made for ascertaining the amount of stock of domestic corporations devoted to business in Kansas, although it is just as essential that this be done in case of a domestic corporation owning and operating property situated in

Kansas and other states as in case of a foreign corporation. So long as the state seeks to require the payment of a fee upon that portion of the capital stock of a corporation only which is devoted to the transaction of intrastate business in the state, it seems that no constitutional objection could be urged. The Legislature seems to have assumed, however, that the ruling of this court in the Telegraph and Pullman cases did not apply to domestic corporations, whether engaged exclusively in intrastate business or in business which was partly intrastate and partly interstate.

The statute imposes a burden on interstate commerce and seeks to tax property beyond the jurisdiction of the State of Kansas, within telegraph and Pullman cases.

While this court, in the Telegraph case and in the Pullman case, was dealing with the rights of foreign corporations, the principles discussed and announced in those cases apply with equal force to corporations organized under the laws of Kansas, provided they are engaged in the business of carrying on interstate commerce and their capital stock and property are devoted to that business, and the larger part situated outside of the state. The law of 1913, attempts to require the payment by a corporation of a tax therein provided for, on the entire capital stock of domestic corporations, regardless of whether said stock is used in the transaction of business in Kansas or in other states, and regardless of whether the capital stock is invested in property in

Kansas or in other states and whether the corporation carried on interstate commerce or not. The law referred to, insofar as it relates to a corporation organized under the laws of the State of Kansas, owning property outside of the state and doing interstate business in the manner described in the plaintiff's petition in this case, is in conflict with the commerce and "due process" clauses of the Constitution of the United States, and comes within the decisions of this court in both the Telegraph and Pullman cases above referred to.

It is alleged in the petition that the plaintiff in error, plaintiff in the court below, is a corporation organized and existing under the laws of the state of Kansas, with an authorized capital stock of 600,000 shares, of the par value of $100.00 each, of which has been issued and paid up and was outstanding 316,600 shares, of the par value of $100.00 each, and that plaintiff by and with the means derived from the issuing and sale of said shares of stock had constructed and acquired a line of railroad and railroads extending through the states above named; that each and every part of said railroad had been for more than ten years prior to the bringing of this suit and was at said time, leased to the St. Louis and San Francisco Railroad Company, which company or the Receivers who had been duly appointed, of its railroads and property, were during the period named in the petition and were at the time of the demand for the payment of the tax and at the time of the filing of the suit, operating said railroad system and

each and every part thereof, as common carriers of passengers and property and engaged in interstate commerce between the several states, and that such property was being used in carrying on interstate commerce.

When the state sought to require of the plaintiff in error, the payment of $2500.00 as a corporation tax or fee on its entire capital stock, which was invested in its property situated in the several states named, and used in carrying on interstate commerce, it sought in effect to place a tax on the instrumentalities with which interstate commerce was carried on, and also to tax property belonging to the appellant, which was not only used in interstate commerce, but was situated beyond the boundaries of the State of Kansas and, therefore, outside of its jurisdiction.

The facts in this case are quite similar to those involved in the Telegraph case. The opinion in that case extends over fifty-six pages, and it is therefore impractical to quote it at any considerable length in this brief, but that the court may grasp at a glance our contention, we desire to quote briefly certain extracts from the opinion, leaving the court to examine the entire opinion and the authorities therein cited.

On page 31, the court, quoting from a prior decision, says:

> "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

Further remarking, the court said:

"So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay *a given per cent of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported."

Further, on page 32, the court said:

"But, as already said, what part of the fee exacted by Kansas is to be attributed to intrastate business and what part to interstate business the State has not chosen to ascertain and declare. It has seen proper to exact a specified per cent of the authorized capital of the Telegraph Company, representing, necessarily, all its business, interstate and intrastate, and all its property interests in and out of the State. It is important here to observe—in deed, the contrary could not be asserted—that the Telegraph Company lawfully entered Kansas, with the consent of both the Territory and

State, for the purposes of its business of every kind long before and was legally there when the Bush Act was passed."

Further, on page 37, it is said:

"It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continute to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits."

On page 38, it was said:

"It is firmly established that, consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits. *Louisville, etc.* v. *Kentucky*, 188 U. S. 385, 398; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209."

On page 42 of the opinion, it was said:

"The statute of Kansas forbids the doing of local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the State a given per cent of its entire capitalization representing the value of all its business, property and interests within and without the State, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the State for purposes of taxation."

On pages 46 and 47, the opinion states:

"If it be true that the statute of Kansas, by its necessary operation, imposes a burden on the

interstate business of the Telegraph Company, and subjects its property and business outside of that state to taxation, then the constitutional validity of the statute, in the particulars adverted to, may be here adjudged without any reference whatever to the judgment in the Prewitt case and without re-examining the grounds upon which that judgment rested."

No distinction between foreign and domestic corporations.

It would seem that there could be no doubt about the meaning of those portions of the opinion of this court herein quoted. In the discussion of the question involved, the court made no distinction between the rights of foreign corporations and those of domestic corporations. Both classes of corporations are protected by the commerce clause of the constitution, if their capital stock is invested in and represents property which the corporations are using in carrying on interstate commerce and which is situated in different states. It is as much a violation of the commerce clause of the constitution, for the state to tax the whole of the capital stock which represents the property with which a domestic corporation carries on interstate commerce, as it is to tax the instrumentalities of a foreign corporation used in carrying on interstate commerce. It is as much a violation of the Constitution for a state to exact a tax on all the capital stock of a domestic corporation as a condition to its right to do business in Kansas, where the property which its stock represents

is used in carrying on interstate commerce and is situated in different states, as it is to exact a tax on the entire stock of a foreign corporation under like circumstances.

In the Telegraph case, *supra,* on page 36, the court further said:

> "If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered to a State, should, in addition solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a *condition* of the right to engage in local business within its limits that the corporation pay a given per cent of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition."

In the case of *Philadelphia & Southern Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, it was held that a tax upon the gross receipts of a steamship company, incorporated under the laws of Pennsylvania, which receipts were derived from the transportation of persons and property by sea, between different states and to and from foreign countries, was a regulation of interstate commerce and in conflict with the constitution of the United States. There, the complainant corpo-

ration owed its existence to the state which sought to tax its gross receipts. The court held that, notwithstanding it was a creature of the state which sought to tax its receipts, the receipts which it was sought to tax being derived from both intrastate and interstate business, it was an attempt to regulate interstate commerce.

The facts in that case are so similar to those in the case now under consideration and the language of the court, expressed in the opinion, is so pertinent that we deem it proper to quote therefrom as follows:

> "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would clearly be unconstitutional. It was held by this court in the case of *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case the tax was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jersey, and the city of Philadelphia. The law under which the tax was imposed was passed by the legislature of Pennsylvania on the 7th of

June, 1879, and declared 'that every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state or territory of the United States, or foreign government, and doing business in this commonwealth' * * * (with certain exceptions named), 'shall be subject to and pay into the treasury of the commonwealth annually a tax to be computed as follows, namely:' the amount of tax is then rated by the dividends declared, and imposed upon the capital stock of the company at the rate of so many mills, or fractions of a mill, for every dollar of such capital stock. It was contended that the ferry company could not hold property in Philadelphia for the purpose of carrying on its ferrying business, and could not carry on its said business there without a franchise, express or implied, from the state of Pennsylvania. But this court held, in its opinion, delivered by Mr. Justice Field, that the business of landing and receiving passengers and freight at the wharf in Philadelphia was a necessary incident to, and a part of, their transportation across the Delaware River from New Jersey; that without it, that transportation would be impossible; that a tax upon such receiving and landing of passengers and freight is a tax upon their transportation, that is, upon the commerce between the two states involved in such transportation; and that Congress alone can deal with such transportation; its non-action being equivalent to a declaration that it shall remain free from burdens imposed by state legislation. The opinion proceeds as follows: 'Nor does it make any difference whether such commerce is carried on by individuals or corporations. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile* v. *Kimball*, 102 U. S. 691. As was said in *Paul* v. *Virginia*, 8

Wall. 168, at the time of the formation of the Constitution, a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power (to Congress) is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or corporations.' p. 204. Again, 'While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and obstruction of, the power of Congress in the regulation of such commerce.' p. 211. It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

"The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the

> former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise."

The case just quoted from was referred to and the doctrine therein announced was affirmed by the same court, in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *The State of Texas*, 210 U. S. 217, the court saying:

> "In *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the State, when such receipts were derived from commerce between the States and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

In the case of *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas, supra*, the court considered the validity of a law enacted by the State of Texas, which sought to impose a tax upon railroad companies, equal to one per cent of their gross receipts. The railroad company whose rights were involved in that case, was a domestic corporation and did not operate any railroad beyond the limits of the State of Texas, but it carried on an interstate business in connection with other railroads, that did extend beyond the confines of the State of Texas. The

court held the law invalid, as it placed a burden upon interstate commerce, and among other things, said:

> "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'
>
> "Of course, it does not matter that the plaintiffs in error are domestic corporations or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state. We are of opinion that the judgment should be reversed."

Both the decision construing the Pennsylvania law and the decision construing the Texas law, support our contention that the fact that the plaintiff in error in this court was a domestic corporation, is of no importance.

Other Cases Involving Similar Taxes.

Since the decision of the Supreme Court in the Telegraph and Pullman cases, the same court has handed

down other decisions which affirm the principles announced in those cases.

In *Meyer, Auditor of the State of Oklahoma* v. *Wells-Fargo & Co.*, 223 U. S. 298, the court had before it a law of the State of Oklahoma which required corporations doing both interstate and intrastate business, to make a return of their gross receipts from all sources, and when such returns were made, the corporations were required to pay a tax on the gross receipts, of three per cent. The express company declined to pay the tax, because it claimed the law required it to pay it upon receipts derived from carrying on interstate commerce as well as intrastate commerce. The court held the law invalid and said:

> "The plaintiff's receipts are largely from commerce among the states, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo* v. *Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the state, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the state to that outside. But we see no warrant for calling the tax a property tax. It is so similar

to the Texas statute held bad in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, as to show that, if one is not copied from the other, they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that."

"It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an *ad valorem* basis.' Even if we read the words which follow without a comma, viz., 'upon the property and assets of such corporation,' as not qualifying those which immediately precede, but as attempting to characterize the "gross revenue tax' as a tax on such property and assets, nevertheless all the property and assets are the subject of the *ad valorem* taxes referred to. Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 266; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162-165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above on the authority of *Fargo* v. *Hart,* 193 U. S. 490, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the state. We may add in this connection that this same requirement as to the

> total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the state."

In *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, a statute of Arkansas was considered by this court, which exacted of foreign corporations, as a condition of their doing business in Arkansas, the payment of certain fees, measured by the entire amount of their capital stock. This court in holding the law invalid said:

> "The capital stock of the company represents, we repeat, all its business, property and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25.050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the State."

The reasoning of the court in the cases from which we have just quoted, applies to the question presented in this case. The plaintiff in error in this case has been required to pay its taxes upon its property situated in the State of Kansas, the same as owners of other properties in the state. The statute now in question, attempts to impose an additional tax or fee, not only upon its stock representing the property situated within the state, but on stock representing its property situated everywhere, both

in Kansas and other states. This court, in the case just quoted from, holds that that is not a property tax, and if it was it would be taxing property, three-fourths of which, as the petition alleges in this case, and as the demurrer admits, is situated outside of the State of Kansas. We submit that under the decisions referred to, the statute under which the plaintiff in error was required to pay to the secretary of state two thousand five hundred dollars, is unconstitutional.

A corporation may pay under protest and recover taxes.

If the statute was invalid, then the plaintiff in error had the right to pay it under protest and to bring this suit to recover the amount so paid. This procedure is especially approved by the court in the case of *The Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor*, 223 U. S. 280. In the syllabi of that case, it is said:

> "Where in addition to money penalties for delay in payment of a tax, there is forfeiture of right to do business and risk of having contracts declared illegal in case of non-payment of disputed tax, the payment is made under duress.
>
> "Where a state officer receives money for a tax paid under duress with notice of its illegality, he has no right thereto and the name of the state does not protect him from suit.
>
> "Where a state statute provides for refunding taxes erroneously paid to a state officer, it contemplates a suit against such officer to recover the taxes paid under protest and duress."

Court Cannot Reshape Statute.

There being no provision in Chapter 135 of the Session Laws of 1913 for ascertaining the amount of the capital stock of domestic corporations devoted to business in Kansas, the tax therein sought to be levied applies to the entire capital stock of the corporation, and the court cannot do what the legislature failed to do and provide a method for ascertaining what portion of the capital stock is devoted to business in Kansas. This court expressly so held in *Meyer, Auditor, etc.* v. *Wells-Fargo Company, supra,* when it said:

> "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

In the Telegraph case, and in the Pullman case, it was held that the state could not exact the payment of a per cent on the entire capital stock of those companies, for the privilege of doing a local business in the State of Kansas. On the same principle, the state cannot exact of the plaintiff in error a tax on its entire capital stock, more than three-fourths of which is invested in property outside of the State of Kansas and all of which is devoted to carrying on interstate commerce, in order that the plaintiff in error may conduct a local business in Kansas.

Minnesota and Baltic Mining Cases Distinguished.

It is the contention of the defendant in error that this case is not to be governed by the rule laid down in

the Telegraph and Pullman cases, and other cases herein cited, but that it comes within the decisions of this court in *United States Express Company* v. *Minnesota*, 223 U. S. 335 and in *Baltic Mining Company* v. *Commonwealth of Massachusetts*, 231 U. S. 68.

The property sought to be taxed in the case of the *United States Express Company* v. *Minnesota*, *supra*, was altogether of a different character than that sought to be taxed in the case at bar, or rather the capital stock which was used as a standard of taxation in that case was invested in a different class of property than in the case now under consideration. Plaintiff in error in this case has its means invested in property that cannot be removed. It is fixed and permanent, as was true in the Telegraph case. In the Minnesota case it was held that the law there under consideration was intended to afford a means of valuing the property of the Express Company within the state, for the purpose of taxation. The tax imposed under the law involved in that case was the only tax that was imposed upon the property of the Express Company. The statute there expressly provided that the tax sought to be collected was in lieu of all taxes upon the property. There is no similarity between the facts in that case and those involved in the case at bar. In the opinion in the Minnesota case, this court emphasized the fact that the property of express companies, being much of it of an intangible character, it is difficult to reach and properly assess for taxation. The property of a railway company is all tangible property

and has a definite location and character. It is not difficult for the state authorities to place a value upon that portion of it situated in the State of Kansas.

In the opinion in the Minnesota case, this court said (p. 346):

> "That court held that the statute was part of a system long in force in Minnesota, passed under the authority of the state constitution, and was intended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law."

There is a marked distinction between the case of *Baltic Mining Co.* v. *Massachusetts, supra,* and the case at bar.

(a) The Act involved in the Massachusetts case did not apply to corporations engaged in railroad, telegraph, telephone, etc. business.

The Act involved in the case at bar applies to corporations engaged in railroad, telegraph, telephone, etc. business.

(b) In the Baltic Mining Co. case the Act did not apply to corporations whose business is interstate commerce.

The Act involved in the case at bar applies to corporations whose business is interstate commerce.

(c) Neither of the companies involved in or parties to the Baltic Mining Co. case was chartered to engage in or carry on a commerce business.

In the case at bar the plaintiff in error was not chartered to engage in or carry on any business other than the business of commerce.

(d) In the Baltic Mining Co. case the two corporations involved were carrying on a purely local and domestic business quite separate from their interstate transactions.

In the case at bar the plaintiff in error was engaged in interstate commerce and was using at all times in question for such purpose all of the capital stock which was taxed in this case.

(e) In the Baltic Mining Company case the agreed facts showed that only a portion of the authorized capital stock of the corporations was taxed.

In the case at bar the allegations contained in the petition of the plaintiff in error, showing that all of its capital stock was taxed by the Act involved, were admitted to be true by the demurrer of the State.

These propositions are apparent from the following language of Mr. Justice Day, in speaking for the court:

> "Construing the act in question, the Supreme Judicial Court of Massachusetts has held it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose busi-

> ness is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. * * *
>
> "In the cases at bar the business for which the companies are chartered is not of itself commerce. * * * From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. * * * While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. * * *"

In view of the language of this court in the foregoing opinion, and in the holding of the supreme judicial court of Massachusetts, it is difficult to see where the decision in that case supports the contention of defendant in error in this case.

It will be contended by the defendant in error that the tax imposed was only a franchise tax and, therefore, can be upheld as such. The court will look to the effect of imposing the tax, rather than to the name of it. The statute does not call it a franchise tax when required of a Kansas corporation; neither does it provide that it shall be a tax on the right to exist or do business as a corporation. It simply provides that upon the filing of the statement there described, with the secretary of state, the corporation shall pay to the secretary of state a sum equal to a certain per cent on its entire capital stock.

In the case of *Crane Company* v. *Looney, Attorney General, et al.*, 218 Fed. 260, the Circuit Court of Appeals for the Fifth Circuit, considered an enactment of the State of Texas, very similar in terms to the statute involved in this case, and held it to be unconstitutional. The court in that case reviewed the opinion of this court in *Baltic Mining Company* v. *Commonwealth of Massachusetts*, and clearly distinguished that case from the case which it considered.

There were ~~to~~ two statutes of the State of Texas, considered by the court in the Crane Company case, and they are as follows:

> "For each foreign corporation obtaining permit to do business in this state shall pay fees as follows: Fifty dollars for the first ten thousand dollars of its authorized capital stock, and ten dollars for each additional ten thousand dollars, or fractional part thereof: Provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph lines in this state, shall in no event exceed ten thousand dollars; provided, however, that mutual building and loan companies, so called, whose stock is not permanent, but withdrawable, shall pay a fee of fifty dollars for the first one hundred thousand dollars, or a fractional part thereof, of its authorized capital stock, and ten dollars for each additional one hundred thousand dollars, or a fractional part thereof; and where the company is a foreign one, then the fee shall be based upon the capital invested in the state of Texas. (Acts 1907, S. S. p. 500. Acts 1905, p. 135. Acts 1889, p. 93. Acts 1889, p.

87. Acts 1883, p. 72. Acts 1909, S. S. p. 267)." Article 7394 is as follows:

"Art. 7394. Tax to be Paid by Foreign Corporations—except as herein provided, each and every foreign corporation, authorized, or that may hereinafter be authorized to do business in this state, shall on or before the first day of May of each year, pay in advance to the secretary of state a franchise tax for the year following, which shall be computed as follows, viz: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of

one million dollars and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock surplus and undivided profits in excess of ten million dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars (Acts 1907, p. 503, Sec. 2)."

The court of appeals in holding these statutes invalid, said:

"It is revealed that the business of plaintiff under its charter is not itself commerce. It is engaged in the manufacture and sale of certain goods and in the purchase and sale of the goods of other manufacturers. The greater part of these goods are disposed of in interstate commerce, and a small portion in intrastate commerce in Texas. A decidedly preponderating percentage of the plaintiff's property is located outside the state of Texas. The same preponderating percentage of its business is done outside the state.

"(1) By the terms of the above statutes the state sought to fix upon certain classes of foreign corporations an excise tax for the privilege of exercising their franchises within the state of Texas. That a franchise tax of this character is within the power of the state to levy there can be no question. *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 228, 12 Sup. Ct. 121, 163, 35 L. Ed. 994.

"(2) The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. *Home Insurance Co.* v. *New York*, 134

U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025. However, a state cannot say to a corporation: 'You may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union;' but a tax levied by the state upon the right of a corporation to do business in the state (that is, a franchise tax) will not be invalidated unless its necessary effect is to burden interstate commerce. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

"(3) Does compliance by the plaintiff with the statutes herein complained of impose a burden upon interstate commerce, or violate the provisions of the first section of the fourteenth amendment to the Constitution? The necessary effect of the enforcement of the two statutes brought into question is to make plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the state and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than

that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule announced in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 42, 30 Sup. Ct. 190, 54 L. Ed. 355, to the effect that a state may not forbid the doing of a local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent of its entire capitalization, representing the value of all its business, property, and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the state is withheld if either of them is not complied with, is to make the privilege of doing a local business in Texas subject to the condition that it shall first pay to the state a given per cent of all its capital and surplus, representing all of its property wherever situated, and all its business, intrastate and interstate.

"An imposition which is based, whether in whole or in substantial part, on the value of property outside of the state, or on interstate or foreign commerce engaged in, so that the amount of it

> grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the state cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold. The statutes in question so obviously impose such a burden that it is not permissible to regard them as privilege taxes or excises, the amount of which is determined by something not having a necessary relation to the amount or value of things which are not subjects of the state's taxing power. The exactions being so made that the amount of them cannot be determined without taking into account the amount of property and business which are not subject to state taxation, and being greater or less according as such property or business is greater or less, the necessary effect of the enforcement of them is to burden such property or business."

If the Circuit Court of Appeals of the Fifth Circuit was correct in its holding on the validity of the Texas statutes, then the statute of Kansas, involved in the suit in hearing, cannot stand as applied to a corporation whose capital stock is invested in property used in interstate and intrastate commerce in such close connection that the one cannot be abandoned without injury to the other. The record shows that such is the case with reference to the property of the plaintiff in error.

Due process and equal protection of the laws.

By the seventh assignment of error (Record, 25), the question is raised, that Chapter 135 of the Session Laws of 1913, if applied to the plaintiff in error, deprives it of its property without due process of law. A

large portion of the property represented by the capital stock of the plaintiff in error, being situated outside of the State of Kansas, any attempt on the part of the State to tax property so situated would be depriving the owner, of property, without due process of law. It is well settled that the state has no authority to tax property situated beyond the boundary lines of the state; if it does so, then it takes property without due process of law. The Supreme Court of Kansas, therefore, erred in holding that the enforcement of the statute in question did not deprive plaintiff in error of property without due process of law.

By the fifth and eighth assignments of error (Record, p. 25) the question is raised that the statute denies to plaintiff in error the equal protection of the law. This court will take judicial notice that in the several states through which the line of railroad of the plaintiff in error extends, provision is made by statute for the assessment and taxation of the property of the railway company in those states, and the presumption is that the property was taxed in accordance with such statutes, and the taxes paid. To require the plaintiff in error to pay an additional tax which is not exacted from other citizens, is denying to the plaintiff in error the equal protection of the law. For the State of Kansas to tax its property situated in other states when it does not attempt to tax the property of other citizens so situated is also a denial of the equal protection of the law.

Under the authorities herein cited, the Supreme Court of Kansas erred in affirming the judgment of the District Court of Shawnee County. It should have rendered a judgment reversing the judgment of that court.

Respectfully submitted,

R. R. VERMILION,
Attorney for Plaintiff in Error.

W. F. EVANS,
Of Counsel.

SUBJECT INDEX.

ALPHABETICAL INDEX OF STATUTES AND CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 450.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, *Plaintiff in Error,*

vs.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, *Defendant in Error.*

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

The three contentions urged by plaintiff in error in this proceeding are:

First: That the provisions of chapter 135, Session Laws of Kansas of 1913, as applied to a domestic railway corporation engaged in interstate commerce, are in violation of article 1 of the constitution of the United States, providing that Congress shall have power to regulate commerce among the several states.

Second: That the act, as applied to the plaintiff in error, deprives it of its property without due process of law.

Third: That the act denies to plaintiff in error the equal protection of the law.

The defendant in error will submit these questions in the order stated.

The act in question, as applied to plaintiff in error, does not regulate or burden interstate commerce.

I.

Chapter 135, Session Laws of Kansas of 1913, imposes an excise tax upon the right or privilege of the plaintiff in error to exist as a corporation under the laws of the state of Kansas.

Such portions of the act (chapter 135, 1913 Laws of Kansas, record, p. 12) as relates to this phase of the question will be briefly stated. Section 1 prescribes the form of annual report to be filed by domestic corporations, and requires that "at the time of filing such annual report it shall be the duty of every corporation for profit or for carrying on any kind of business, incorporated under the laws of this state, to pay to the secretary of state an annual fee, as follows: . . . when the paid-up capital stock exceeds five million dollars the annual fee shall be twenty-five hundred dollars."

Section 2 requires a similar report from foreign corporations licensed in Kansas, and the payment of an annual fee, computed from the portion of such company's capital stock as is devoted to its Kansas business, "for the privilege of exercising its franchise in Kansas."

Section 5 provides for a recovery of the annual fee by civil action in the name of the state. Section 6 authorizes the forfeiture of the charters of domestic corporations and of the licenses of foreign corporations for nonpayment of the annual fees. Section 10, as amended by chapter 136, Laws of 1913, exempts educational, religious, scientific, and charitable corporations, and all banking, insurance, and building and loan corporations, and all corporations not organized for pecuniary profit. Section 12 exempts corporations required to make detailed reports to other state departments (including plaintiff in error, which reports to the Utilities Commission) from making the detailed report to the secretary of state required in sections 1 and 2, except as to their issued and paid-up capital, so that the proper amount of fee may be ascertained.

The franchises of domestic corporations are the creatures of the state creating the corporation. They are granted by the state, and depend for their existence upon the existence of the state. It is therefore right that the privilege of possessing and exercising such franchises should bear a fair proportion of taxation.

"The right or privilege to be a corporation or to do business as such body is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. . . . The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe."

Home Ins. Co. v. New York, 134 U. S. 594.

The right to exercise franchises of this character is more valuable in case of a large corporation than in case of a small one, and the amount of the capital stock of the corporation involved is naturally taken as the measure or value of the franchise granted, and as the measure of compensation demanded by the state in exchange for such grant.

"The validity of the tax [upon the privilege to be a corporation] can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. . . . Its action in this matter is not the subject of judicial inquiry in a federal tribunal."

Home Ins. Co. v. New York, 134 U. S. 594.

This is patently not a property or *ad valorem* tax, nor is it in lieu of any property tax, as applied to plaintiff in error. It is stated in section 2 of the act that the annual fee shall be paid by a foreign corporation "for the privilege of exercising its franchise in Kansas." The tax is not a charge or lien upon any of the physical property of the corporation. The only means of collection the state has is by civil action. The only penalty upon nonpayment is forfeiture of the charter or franchise. Thus the state takes away the privilege for which the charge is exacted, if this privilege be not paid for. The state is not taxing the property of the corporation, nor its capital stock, but is exacting a fee for the privilege of corporate existence. It should be noted that there is no determination of the value of the capital stock or of the property in which it is invested, as would be necessary in levying any tax other than

a franchise tax. It is pertinent also that the highest capitalization taken as an index of the franchise value is five million dollars. If this were anything other than a franchise tax the state would certainly consider capitalization in excess of five million dollars in levying the tax.

The Kansas supreme court defined this charge as a franchise tax in the decision from which this appeal is taken. The court said:

"The fee collected is a tax upon the right of corporate existence—the franchise granted by the state to be a corporation —to do business with the advantages associated with that form of organization."

Record, page 15.

Railway Co. v. Sessions, 95 Kan. 261.

Franchise taxes of this character have been such a frequent subject of judicial determination by this court that defendant in error will but briefly call the court's attention to its former decisions defining such taxes. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the business done, or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, or by the amount of capital employed in exercising such privileges, without respect to the nature or value of the taxpayer's assets, it should be considered a franchise tax. These considerations determined this court's decision in Society for Savings v. Coite, 6 Wallace, 594; Hamilton Manufacturing Company v. Commonwealth of Massachusetts, 6 Wallace, 632; Provident Institution for Savings v. Commonwealth of Massachusetts, 6 Wallace, 611.

II.

The state has full power to impose such a privilege tax.

The right of the state to impose conditions upon which it will confer corporate privileges, and to exact payment for such privileges, has never been seriously questioned. In Society for Savings v. Coite, *supra*, this court said:

"Nothing can be more certain in legal decision than that the privilege and franchises of a private corporation . . . may be taxed by a state for the support of the state government."

See, also, Hamilton Manufacturing Company v. Commonwealth of Massachusetts, 6 Wallace, 632;

Provident Institution for Savings v. Commonwealth of Massachusetts, 6 Wallace, 611;

Horn Silver Mining Company v. New York, 143 U. S. 305;

Philadelphia Ry. Co. v. Pennsylvania, 15 Wallace, 284;

Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326;

Minot v. Ry. Co., 18 Wallace, 206.

III.

Such a franchise tax, if otherwise valid, may be computed or measured in amount by the amount of the capital stock of the corporation employed in part in carrying on interstate commerce.

It is not contended by The State that it can burden or regulate interstate commerce through the exercise of its taxing powers, but that the state may impose a franchise tax upon the entire capital of the corporation—all of which is employed in exercising the thing taxed, *i. e.*, the franchise, notwithstanding the corporation is engaged in interstate commerce, or that such commerce may be indirectly affected thereby. Where a tax is lawfully imposed upon the exercise of privileges, within the taxing power of the state, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself not taxable. The distinction lies between the intention to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.

Flint v. Stone Tracy Company, 220 U. S. 107.

Further instances of valid taxes levied against legitimate objects of taxation, although measured in part by capital employed in or by receipts from property or business not itself taxable, as distinguished from taxes levied directly or levied indirectly, but substantially, upon nontaxable property, are discussed in U. S. Express Company v. Minnesota, 223 U. S. 335, wherein the court holds to the doctrine that an otherwise valid tax may be computed by reference to things not taxable.

A more recent decision sustaining the same rule of law is Baltic Mining Company v. Massachusetts, 231 U. S. 68, where it is stated:

"It is well settled . . . that the power of Congress over interstate commerce is supreme under the federal constitution and that the states may not burden such commerce. . . . It is equally well settled that forms of regulation prohibited to

the state by the constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. . . .

"While this is true, other equally well established principles must be borne in mind in considering the validity of the state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. . . . It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. . . ."

The court approved the language of the supreme court of Massachusetts in considering the character of the tax in this same case, wherein the Massachusetts court said:

"The required payment is strictly of an excise tax and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts with the protection of our laws and the financial and other advantages of a situation here."

Further in the opinion of the supreme court of the United States we find the following:

"That the state may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted. . . ."

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. . . ."

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce. . . ."

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax in itself lawful without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state, so, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so

far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

In every case wherein this court has determined a so-called franchise tax to be invalid it appeared to the court from its consideration of the state statute imposing the tax that the *res* taxed was in fact the capital or property employed in or receipts obtained from interstate commerce. But where the court determined that the thing taxed was the franchise itself, it has approved the measurement of such a valid tax by a computation based upon the capital employed in or receipts derived from such interstate commerce.

IV.

The statute imposing the tax provides that the amount to be paid for the privilege for which it is required shall be determined by reference to the capital employed in exercising that privilege, and such capital, or the property in which such capital is invested, is not itself taxed.

The capital stock of plaintiff in error is not itself taxed, but it is resorted to as a mere measure of a tax upon the franchise of the corporation. As heretofore pointed out, there is no provision for ascertaining the actual value of the issued capital stock, or of the property in which it is invested, of any domestic corporation. Any tax levied against the capital or property as such must necessarily be based upon some ascertained value. It is common knowledge that the shares of stock of different corporations, each representing the same face value or par value, may have vastly different monetary values. However, it may be very naturally considered that the naked franchise giving a corporation the right to exist, with a certain specified capital stock, is as valuable as any other naked franchise permitting an equal capitalization. If the capital stock or property of the corporation were valued in money under the provisions of this taxing statute there might be reason to consider that such capital or property was being taxed. But such is not the present instance.

There is no taking of property upon default in payment of the tax, nor a lien upon the shares of stock or the capital or any funds of the corporation. Upon nonpayment the state only takes away that for which the tax is exacted—the corporate

franchise. The state imposes a charge against the primary franchise of all domestic corporations, including carriers, and measures the tax according to the capital employed in exercising such franchise.

It is immaterial, therefore, that the capital stock is invested in property outside of the state which is used in interstate commerce.

"From the very nature of the tax, being laid upon a franchise given by the state, and revocable at pleasure, it can not be affected in any way by the character of the property in which its capital stock is invested. The power of the state over the corporate franchise, and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other."

Home Ins. Co. v. New York, 134 U. S. 594.

"In the case now before the court the tax . . . is levied upon the corporation for the privilege of carrying on its business in a corporate or organized capacity. As the chief judge says, if the parties beneficially interested in the company are dissatisfied with the price exacted by the state for this privilege, they may carry on the business as individuals without paying any charge. In other words, the charge is not upon the navigation of the river, but is upon the doing of business as a corporation of the state within the state. While the state may not require a navigation license . . . it may certainly, as to a corporation of its own creation, having property within its borders, enforce its usual and customary systems of taxation without infraction of the superior authority and laws of the United States concerning the navigation of rivers."

New York, *ex rel.*, v. Sohmer, 35 S. C. R. 162.

So here the charge is not upon interstate commerce, but is upon the doing of business as a corporation of the state.

V.

The statute in question, as applied to domestic railway corporations, does not burden interstate commerce.

As heretofore stated, the state is exacting a charge from its domestic corporations for the privilege of corporate existence, with its accompanying rights and privileges. The fact that the exercise of these rights is involved, in whole or in part, in the carrying on of interstate commerce, does not deprive the state of the right to impose charges upon them, if the same charges are imposed upon all franchises, whether the corporations exercising them are engaged in interstate commerce or

not. The same rule applies in the case of such rights as in the case of physical property. Both, if within the state, are subject to taxation by the state, whether used in carrying on interstate commerce or not.

In Philadelphia Railroad Company v. Pennsylvania, 15 Wallace, 284, the state of Pennsylvania required all railroad companies to pay a tax of three-fourths of one per cent upon the gross receipts of the companies. This court held this tax to be valid, upon two grounds: first, because the tax was upon receipts after they had been received and mingled with other property of the corporation, so as to have lost all connection with interstate commerce; and, second, because the charge in question was a tax upon the franchise of the company. On the latter point the court said:

"There is another view of this case to which brief reference may be made. It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

"Influenced by these considerations, we hold that the act of the legislature of the state imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the states."

In Philadelphia Steamship Company v. Pennsylvania, 122 U. S. 326, the law of the state of Pennsylvania required all corporations incorporated by it to pay a tax of eight-tenths of one per cent upon the gross receipts of such companies. This tax was held to be void, as a burden upon interstate commerce, the court criticising the first reason given for sustaining the law in the case of Philadelphia Railroad Company v. Pennsylvania, above cited. But the court approved the second reason therein given, saying:

"The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the

former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce."

In Minot v. Railroad Company, 18 Wallace, 206, the law of the state of Pennsylvania required all railroad companies incorporated by it to pay a tax of one-fourth of one per cent upon the actual cash value of every share of its capital stock, with a proviso that, in the case of railroads lying partly within and partly without the state, the company should be required to pay on such number of its shares of capital stock only as would be in that proportion to the whole number of shares which the length of the road within the state should bear to the total length of the road. It was contended that this division of the capital stock was not an equitable division as to the company, and did not enable the state to reach the fair value of the property taxed within the state. The court held, however, that, since the thing taxed, that is, the franchise of the company, was something which the state had full power to tax, the method of arriving at the value of the thing taxed was immaterial. The court said:

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In that case the court said further:

"The tax imposed by the act in question affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed in this court in a recent case, 'Every tax upon personal property, or upon occupations, business or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation

of it, within the meaning of the constitution.' (Philadelphia Ry. Co. v. Pennsylvania, 15 Wall. 284.)

"The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports or tonnage, or transportation to other states, can not be regarded as conflicting with any constitutional power of Congress."

In Ferry Company v. East St. Louis, 107 U. S. 365, the court said:

"The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power to license, tax and regulate ferries, the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the act by which this exaction is authorized will not be held to be a regulation of commerce."

If a license tax on the charters of ferries which are engaged in interstate commerce is not a burden upon interstate commerce, it must follow that a similar tax upon the right to be a corporation is not a burden upon interstate commerce.

In Ashley v. Ryan, 153 U. S. 436, it was determined by the supreme court, as stated in the headnote to the opinion, that:

"If several railroad corporations, each existing under the laws of separate states, consolidate into one corporation, a statute of one of the states, imposing a charge upon the new consolidated company of a percentage on its entire authorized stock as the fee to the state for the filing of the articles of consolidation in the office of the secretary of state of the state, without which filing it could not possess the powers, immunities, and privileges which appertain to a corporation in that state, is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limits.

"A state, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained."

In the opinion the court says:

". . . Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

"The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without the state's consent they could not have been procured. . . . Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the state of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the secretary of state exacted. As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. . . . Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company can not be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. . . ."

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. . . .

"The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines but simply the right of the state to determine upon

what conditions its laws as to the consolidation of corporations may be availed of.

"Considering, as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax on interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits."

In Railroad Company v. Maryland, 21 Wall. 456, wherein the court sustained a charge of one-fifth of the amount received from the transportation of passengers over a certain railroad as not being a burden upon interstate commerce, the court said:

"It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in future;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

VI.

The question involved is not within the rule of law determined in Western Union Telegraph Company v. Kansas, 216 U. S. 1, and Pullman Company v. Kansas, 216 U. S. 56.

Plantiff in error relies upon the two recent decisions last above mentioned in support of its contention that the state has burdened interstate commerce. The cases mentioned are easily to be distinguished from the present instance. In the Telegraph Company and Pullman cases the state attempted to exact a given per cent upon the entire capital stock of these foreign corporations invested throughout the United States, solely in exchange for the privilege of doing a local intra-state business. Neither corporation was a creature of the state attempting thus to tax it. Neither corporation had secured

from the state the privilege of corporate existence, or the privilege of issuing the stock which was taxed, or the privilege of accumulating in a corporate capacity the property in which such capital was invested. The only privilege which the corporations had secured from the state of Kansas was that of doing a local intra-state business, and the state was attempting to tax the whole of their capital solely on account of that privilege. The Telegraph Company was required to pay a fee of $20,100, the Pullman Company $14,800—sums measured by their entire capitalization, in the computation of which every dollar of their issued capital stock was reached—solely for the privilege of maintaining their local offices and transacting their local business. The measurement of the tax was wholly unrelated to the privilege which was taxed.

The Kansas supreme court, in the decision from which this appeal is prosecuted, examined the Western Union Telegraph Company and Pullman cases, and pertinently remarked:

"As already suggested, for the state to assess a tax gauged by the total capital stock, upon the right to exist as a corporation, which it has granted, is a very different thing from requiring a business to pay the state a percentage of what it earns by each transaction undertaken, some of them being of an interstate character. A tax measured by the capital stock may in some situations be equivalent to a charge upon the whole business done, while in others it is not. In the case just quoted from, the statute which was held void undertook to require a foreign corporation, as a condition to doing a purely local business in Kansas, to pay a fee fixed by a graduated percentage of its total capital stock, which was largely employed in business elsewhere, and in interstate commerce. There was no logical connection between the amount charged and the extent or value of the business done wholly within the state, the only matter over which the state had control. Here the amount of the tax has a direct relation to the scope and value of the privilege conferred and controlled by the state—the right to be a corporation."

Record, p. 17.

Railway Co. v. Sessions, 95 Kan. 261.

VII.

Other cases distinguished.

In the case of Philadelphia Steamship Company v. Pennsylvania, relied upon by plaintiff in error, and cited elsewhere in this brief, this court declared the tax invalid because it was not a franchise tax, but a tax upon the business of carriers en-

gaged in interstate commerce. The same is true in Galveston, Harrisburg & San Antonio Ry. Company v. Texas, 210 U. S. 217. In Meyer v. Wells Fargo Express Company, 223 U. S. 298, the court held the statute of Oklahoma to be similar to the Texas statute previously considered, and condemned it for the same reasons. In Ludwig v. Western Union Tel. Co., 216 U. S. 146, the complaining company was a foreign corporation, but was taxed upon its entire capitalization, not for the privilege of corporate existence, but for its local business. The same is true of Crane Company v. Looney *et al.*, 218 Fed. 260.

Plaintiff in error contends that the present instance differs from the Baltic Mining Company case in that the facts substantially showed that only a portion of the company's capital was taxed in that case, and asserts that in this case all of its capital is taxed. However, the pleadings show that the corporation has a paid-up capital of $31,660,000, but that the tax is graduated only up to a capitalization of $5,000,000—the fee limited to $2500. In the Baltic Mining Company case the court reasoned that limiting the tax to a maximum of $2000 led to the conclusion that the authorized capital was only used as a measure of a lawful tax, and without the necessary effect of burdening commerce. The same is true in the present instance.

VIII.

No denial of due process and equal protection of the laws.

Under the fifth, seventh, and eighth assignments of error, plaintiff in error predicates his argument upon the premise that the property represented by the capital stock of the plaintiff in error is attempted to be taxed by the state under the act in question. As heretofore pointed out, the property of the corporation is not taxed, nor is the capital stock of the corporation invested in such property taxed. The privilege of being a Kansas corporation is the privilege for which the tax is exacted. The statute is not subject to these objections unless it be also void for reasons heretofore urged by plaintiff in error.

Plaintiff in error has sought and has obtained from the state of Kansas the primary franchise of being a corporation, upon which franchise its whole corporate existence is built. The state has required payment for this valuable privilege, and has adopted as a measure of the price it will exact for the privilege

a sum computed by reference to the capital involved in possessing and exercising that privilege. It is exacting a tax for the same privilege measured in the same manner from every other corporation existing under its laws. It is exacting from foreign corporations a privilege tax measured in the same ratio, by the capital employed within the state in exercising the license granted to do business within the state. The tax imposed is within the lawful authority of the state, and is not invalid by reason of the fact that it may indirectly and remotely affect interstate commerce.

Respectfully submitted.

S. M. BREWSTER,
Attorney-general,
JAMES P. COLEMAN,
For Defendant in Error.

W. P. MONTGOMERY,
J. L. HUNT,
Of Counsel.

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No. 450.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

J. T. BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS, DEFENDANT IN ERROR.

IN ERROR TO SUPREME COURT OF THE STATE OF KANSAS.

REPLY OF PLAINTIFF IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

R. R. VERMILION,
Attorney for Plaintiff in Error.

W. F. EVANS,
Of Counsel.

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REPLY OF PLAINTIFF IN ERROR TO BRIEF OF DEFENDANT IN ERROR.

We desire in the way of reply to the brief filed by the defendant in error, to discuss the authorities cited and to point out wherein they do not support the contention of the defendant in error.

The only ground upon which counsel for defendant in error contend that the law in question in this case is valid, is that it provides for an excise tax on all corporations; that is, a tax on the business in which the corporations in the State of Kansas are engaged. As to corporations whose business is carried on exclusively within the State of Kansas and as to corporations whose business does not include the carrying on of interstate commerce, the State, through its Legislature, probably has the right to pass a law providing for the payment of an excise tax, but as to corporations whose business is that of carrying on interstate commerce, a state cannot require the payment of a tax as a condition to the carrying on of such business.

As the trial court sustained a demurrer to the petition of the plaintiff in error, it is well to note the allegations of the petition concerning the kind of business the plaintiff in error was engaged in and the kind of business its property was devoted to. It was alleged,

> "That said railroad and each and every part thereof has been for more than ten years last past, and is now leased to the St. Louis & San Francisco Railroad Company, which company or the receivers who have been duly appointed for its railroads and property have during the period herein named, and are now operating said railroad system and each and every part thereof as common carriers of passengers and property for hire and engaged in interstate commerce between the several states hereinbefore named. That all of the said capital stock of the plaintiff so issued and outstanding is, and has been for more than ten years last past, invested

in and used in acquiring said above described railroad line and lines extending into and through the above named states which have been during all the times aforesaid and now are being used in carrying on interstate commerce" (Record, pp. 6, 7).

If it should be held that the statute in question imposes a tax on the business which the plaintiff in error in this case was carrying on or the business in which its property was used, then it follows that the law provides for a tax upon interstate commerce or upon the right to carry on interstate commerce in the State of Kansas, which, as we have argued in our principal brief, cannot be done.

The defendant in error has cited two comparatively recent cases in support of the validity of the law. One is the *People of the State of New York ex rel. Cornell Steamboat Co.* v. *William H. Sohmer as Comptroller of the State of New York*, 35 Sup. Crt. Rep., 162. The law involved in that case provided for the payment of a tax for the privilege of exercising a corporate franchise or carrying on business as a corporation within the State of New York. The tax exacted was five-tenths of one per cent of the gross earnings *within the state* and not five-tenths of one per cent of the receipts of the steamboat company from all sources. The tax required to be paid was measured by the earnings of the company from business conducted within the state, and did not include earnings from business conducted outside of the state or from business conducted between the State of New York and other states.

The case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, has been cited in support of the contention that the tax provided for by the Kansas law does not place a burden upon interstate commerce. The law involved in the case referred to was an act of Congress requiring corporations to pay a certain per cent upon their earnings, or a sum equivalent to one per cent upon the entire net income over and above $5000.00. As the right to regulate interstate commerce is conferred by the Constitution upon Congress, the law was held to include all corporations, whether engaged in such business or not. The question of the right of a state to pass an excise law or any other kind of a law that would burden interstate commerce was neither discussed nor decided in that case.

Wiggins Ferry Company v. *East St. Louis*, 107 U. S. 365, is another case cited in support of the law now under consideration. The act of the legislature creating the corporation known as Wiggins Ferry Company, reserved the right to impose the tax provided for, and in addition to this, the act did not impose a tax upon the business of the Ferry Company, but on its property the *situs* of which was within the jurisdiction of the municipality imposing the tax. On page 373, the court declared:

> "The levying of a tax upon vessels or other water-craft or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, it not a regulation of commerce within the meaning of the Constitution of the United States."

Ashley v. *Ryan*, 153 U. S. 436, cited in the brief of defendant in error, was a case involving the right of a consolidated company to file its articles of consolidation in the office of the Secretary of State, without paying the fees which the law provided should be paid before that privilege should be granted. It is not contended that a state does not have the right to prescribe the conditions on which corporations can be organized under its laws or foreign corporations can be admitted to do business within its borders, where the requirements are made before rights have been acquired. The case just referred to, in no way determines the right of a state to tax the business of a corporation engaged in interstate commerce.

In neither *Home Insurance Co.* v. *New York State*, 134 U. S. 594, nor *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, was the corporation complaining of the tax, engaged in interstate commerce; and the right of the state to tax parties engaged in such business was not determined.

In *Railroad Company* v. *Maryland*, 21 Wallace, 456, the tax in controversy was fixed in advance, in the charter of the railroad company. This court, in that case, expressly declared that the stipulation in the charter of the company was different in principle from the imposition of a tax on the movement or transportation of goods from one state to another. The case, therefore, does not support the proposition contended for here, that the state has the right to impose a tax upon the business of carrying on interstate commerce.

In the Delaware Railroad tax case, 18 Wallace, 208, the law under consideration expressly confined the tax to such portion of the capital stock of the company devoted to business within the state. The law did not require the payment of a tax on the entire capital stock, when it was invested in property situated in different states, and with which interstate commerce was carried on.

State Tax on Railway Gross Receipts, 15 Wallace, 284, has also been cited in support of the contention of the defendant in error. Whatever construction may be placed upon the language of the court in that case, this court has quite recently, in the case of *State of Oklahoma* v. *Wells Fargo & Co.*, 223 U. S. 298, held that a state cannot require a corporation to pay a tax on its gross revenues, part of which are derived from interstate commerce. The opinion in that case contains a full discussion of the question of the right of a state to tax income derived from the business of carrying on interstate commerce, and clearly supports the contention of the plaintiff in error that the law in question is invalid.

The case of *Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S. 326, instead of supporting the contention that the State of Kansas had a right to exact from corporations engaged in interstate commerce a franchise or excise tax on their entire capital stock, holds exactly the contrary.

Every case cited in the brief of the defendant in error is easily distinguishable from the case now under consideration, and not one of them supports the conten-

tion that the Act of the Legislature of Kansas of 1913 is valid, when applied to corporations engaged in the business of carrying on interstate commerce. Neither do they in any wise conflict with the decisions of this court which we have cited in our principal brief.

Respectfully submitted,

R. R. VERMILION,
Attorney for Plaintiff in Error.

W. F. EVANS, *Of Counsel.*

KANSAS CITY, FORT SCOTT & MEMPHIS RAILWAY COMPANY *v.* BOTKIN, SECRETARY OF STATE OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 450. Submitted January 7, 1916.—Decided February 21, 1916.

The State cannot lay a tax on interstate commerce in any form by imposing it either upon business constituting such commerce or on the privilege of engaging in it, or upon the receipts as such derived therefrom.

Whether a state tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause depends upon the operation and effect of the tax as enforced and

not upon the manner in which the taxing scheme has been characterized.

The State has authority to tax a domestic corporation for the privilege of being a corporation, and such a tax is not necessarily invalid because measured by the capital stock, part of which may represent capital not subject to the taxing power of the State.

A State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation may be engaged in interstate commerce.

The validity of each tax must be decided upon its own facts, and a tax within the taxing power of the State will not be condemned as repugnant to the Federal Constitution unless its natural operation and effect render it a prohibited exaction.

The tax imposed by chapter 135, Kansas Laws of 1913, on the privilege of being a corporation is not laid upon interstate commerce or receipts therefrom or fluctuating with the volume of interstate business, but is simply graduated according to paid up capital with a reasonable maximum; and it is not, as to a domestic corporation engaged in both interstate and intrastate commerce, invalid either as a violation of the commerce clause as taxing interstate commerce or of the due process clause of the Fourteenth Amendment, as taxing property beyond the jurisdiction of the State.

95 Kansas, 261, affirmed.

THE facts, which involve the constitutionality under the commerce and due process clauses of the Federal Constitution and the construction of the statute of Kansas of 1913 imposing annual taxes on corporations, are stated in the opinion.

Mr. R. R. Vermilion and *Mr. W. F. Evans* for plaintiff in error:

The tax involved is not in lieu of property tax. The statute provides no method for ascertaining proportion of stock of domestic corporations devoted to Kansas business. The statute imposes a burden on interstate commerce and seeks to tax property beyond the jurisdiction of the State of Kansas. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 31.

There is no distinction between foreign and domestic

corporations. *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 36; *Phila. & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Ludwig* v. *West. Un. Tel. Co.*, 216 U. S. 146.

A corporation may pay under protest and recover taxes. *Atchison, Topeka &c. Ry.* v. *O'Connor*, 223 U. S. 280.

This court cannot reshape the statute. *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *United States Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *Crane Co.* v. *Looney*, 218 Fed. Rep. 260, can be distinguished and do not apply.

The statute denies due process and equal protection of the laws.

Mr. S. M. Brewster, Attorney General of the State of Kansas, *Mr. James P. Coleman*, *Mr. W. P. Montgomery* and *Mr. J. L. Hunt* for defendant in error:

The act in question, as applied to plaintiff in error, does not regulate or burden interstate commerce. It imposes an excise tax upon the right or privilege of the plaintiff in error to exist as a corporation under the laws of the State. *Railway Co.* v. *Sessions*, 95 Kansas, 261; *Society for Savings* v. *Coite*, 6 Wall. 594; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632; *Provident Inst. for Savings* v. *Massachusetts*, 6 Wall. 611; *Home Ins. Co.* v. *New York*, 134 U. S. 594.

The State has full power to impose such a privilege tax. Cases *supra* and *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Philadelphia R. R.* v. *Pennsylvania*, 15 Wall. 284; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Minot* v. *Railway Co.*, 18 Wall. 206.

Such a franchise tax, if otherwise valid, may be computed or measured in amount by the amount of the capital stock of the corporation employed in part in carrying on

interstate commerce. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *U. S. Exp. Co.* v. *Minnesota*, 223 U. S. 335; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68.

The statute imposing the tax provides that the amount to be paid for the privilege for which it is required shall be determined by reference to the capital employed in exercising that privilege, and such capital, or the property in which such capital is invested, is not itself taxed. *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549.

The statute in question, as applied to domestic railway corporations, does not burden interstate commerce. *Philadelphia R. R.* v. *Pennsylvania*, 15 Wall. 284; *Philadelphia S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Minot* v. *Railway Co.*, 18 Wall. 206; *Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Ashley* v. *Ryan*, 153 U. S. 436; *Railroad Co.* v. *Maryland*, 21 Wall. 456.

The question involved is not within the rule of law determined in *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; see *Railway Co.* v. *Sessions*, 95 Kansas, 261.

The other cases cited by plaintiff in error can be distinguished.

There is no denial of due process or equal protection of the laws.

Mr. Justice Hughes delivered the opinion of the court.

By Chapter 135 of the Laws of 1913, of Kansas, every domestic corporation is required to pay to the Secretary of State an annual fee which is graduated according to the amount of its paid-up capital stock. When this capital stock does not exceed $10,000, the fee is $10; when it exceeds $10,000 but is not over $25,000, the fee is $25; and there are further increases, graduated as stated, until the maximum fee of $2,500 is reached, that sum

being payable in all cases where the paid-up capital stock exceeds $5,000,000. The plaintiff in error is a railroad corporation organized under the laws of Kansas, and its road extends into several States. It has a paid-up capital stock of $31,660,000. On March 31, 1914, it paid to the Secretary of State, under protest, the required fee of $2,500 and brought this action to recover the amount, insisting that the tax is a direct burden upon interstate commerce and is laid upon property outside the State, and hence is invalid under the Federal Constitution. The Supreme Court of Kansas sustained the tax, thus defining its nature: "The fee collected is a tax upon the right of corporate existence—the franchise granted by the State to be a corporation—to do business with the advantages associated with that form of organization." 95 Kansas, 261.

It must be assumed, in accordance with repeated decisions, that the State cannot lay a tax on interstate commerce 'in any form,' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. *State Freight Tax Cases*, 15 Wall. 232; *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, 344; *Leloup* v. *Mobile*, 127 U. S. 640; *Lyng* v. *Michigan*, 135 U. S. 161, 166, *McCall* v. *California*, 136 U. S. 104; *Galveston, Harrisburg &c. Ry.* v. *Texas*, 210 U. S. 217, 228; *West Un. Tel. Co.* v. *Kansas*, 216 U. S. 1, 36, 37; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 65; *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 83. And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized. *Galveston, Harrisburg &c. Ry.*

v. *Texas, supra; U. S. Expr. Co.* v. *Minnesota*, 223 U. S. 335, 346; *St. Louis Southwestern Ry.* v. *Arkansas*, 235 U. S. 350, 362.

Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania, supra; Ashley* v. *Ryan*, 153 U. S. 436; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 559, 560. And, agreeably to the priniciple above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant

to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Mining Co.* v. *Massachusetts, supra*), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.

In *Philadelphia & Southern S. S. Co.* v. *Pennsylvania, supra*, the State had laid "a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation." As the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between States and foreign countries, and from the charter of its vessels which was for the same purpose." It was necessarily concluded that the tax was imposed upon interstate commerce. In *Galveston, Harrisburg &c. Ry.* v. *Texas, supra*, the tax upon the railroad company was "equal to one per centum of its gross receipts." The court held that this was "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" By the statute which was under review in *West Un. Tel. Co.* v. *Kansas, supra*,—as was said in *Flint* v. *Stone Tracy Co.*, 220 U. S., p. 163, summarizing that case—the State "undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in

commerce among the States, as a condition of doing local business within the State of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid." To the same effect were *Pullman Co.* v. *Kansas, supra,* and *Ludwig* v. *West Un. Tel. Co.,* 216 U. S. 146. The act before the court in *Meyer* v. *Wells, Fargo & Co., supra,* which provided for what was called a "gross revenue tax," was deemed to be "so similar to the Texas statute held bad" in the case of *Galveston, Harrisburg &c. Ry.* v. *Texas,* as to deserve a similar condemnation. On the other hand, in *U. S. Exp. Co.* v. *Minnesota, supra,* it appeared that the reference to gross receipts was only intended fairly to measure a tax upon a subject within the taxing power of the State, and the tax was sustained. And, in the case of *Baltic Mining Co.* v. *Massachusetts, supra,* where a tax on foreign corporations was measured by the authorized capital stock and was limited to $2,000, the court also reached the conclusion "that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce," and that hence the legislation was within the authority of the State. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporations before the court were "sold and shipped in interstate commerce," and that to that extent they were "engaged

in the business of carrying on interstate commerce" and were "entitled to the protection of the Federal Constitution against laws burdening commerce of that character." It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a direct burden upon interstate commerce that the tax was upheld. 231 U. S., pp. 68, 86, 87.

In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax—on the privilege granted by the State of being a corporation—and while it is graduated according to the amount of paid-up capital stock the maximum charge is $2,500 in the case of all corporations having a paid-up capital of $5,000,000, or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce.

For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the State. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all.

Judgment affirmed.